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Information Freedom, a Constitutional Value for the 21st Century

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I. Introduction

In the United States, the debate over communications issues like network neutrality, copyright law, and public broadcasting often seems to be carried out in a constitutional vacuum. The First Amendment, while understood as a "free speech" protection, is not infrequently just the opposite - either missing in action, or applied in a way to lessen the amount and variety of speech, information, and opinion available to the public. One reason for this, as developed below, is that the First Amendment is framed linguistically as a negative - "government shall make no law . . . abridging the freedom of speech" - and the Courts have generally focused on the "no law" rather than the "freedom of speech" part of this command.

This paper compares First Amendment jurisprudence on this point to a system built on a constitution phrased in the affirmative, guaranteeing freedom of the press and broadcasting as *institutions*, and protecting speech and information flows as dynamic *processes*. The German post-war constitution (the *Grundgesetz* or Basic Law) was built on the ashes of a fascist dictatorship that had misused mass communications, and was structured to make such a catastrophe as unlikely as possible in the future. Article 5 of the

Basic Law provides for freedoms of speech, information, broadcasting, and the press; these freedoms are intertwined and subsumed under the rubric of "communications freedom."[1] This paper headlines information freedom as particularly salient in an Information Age, and particularly evocative of the differences in constitutional approach between the two countries, but this is not meant to distort the unified fabric of the German communications freedoms.

In a dozen or so seminal cases from 1961 to the present, the German Constitutional Court[2] has claimed the media, and particularly the electronic broadcast media, for the project of self-government, and has linked the media to dominance-free "opinion-building" in both the personal and public spheres.[3] While the First

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1. *See* Christopher Witteman, *Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom*, 33 HASTINGS INT'L & COMP. L. REV. 95, 115 (2010) [hereinafter *Constitutionalizing Communications*]. That article was itself an update of a student "Note" I had written twenty-seven years earlier: Christopher Witteman, *West German Television Law: An Argument for Media as an Instrument of Self-Government*, 7 HASTINGS INT'L & COMP. L. REV. 145, 197 (1983) [hereinafter *West German Television Law*].

2. Or *Bundesverfassungsgericht*, which is usually and strictly translated as Federal Constitutional Court, abbreviated FCC. As this paper deals extensively with another FCC, the U.S. Federal Communications Commission, the *Bundesverfassungsgericht* will be referred to herein as the German Constitutional Court, or Constitutional Court, or German Court. The U.S. Supreme Court will be referred to as Supreme Court. Constitutionally, these two highest courts perform in much the same way, adjudicating constitutional questions presented by clashes between government divisions and between government and the governed. The Supreme Court, however, also handles nonconstitutional questions of statutory interpretation and civil law which in Germany are handled by a separate court, the *Bundesgerichtshof*, or Federal Court of Justice. *See* http://www.bverfg.de/en/index.html FEDERAL COURT OF JUSTICE, *Position of the Federal Court of Justice in the Federal Court System*, at 4, *available at* http://www.bundesgerichtshof.de/SharedDocs/Downloads/EN/BGH/brochure.pdf?__blob=publicationFile.

3. "Free individual- and public opinion building" (*freie individuelle- und oeffentliche Meinungsbildung*) is a recurrent trope in the Court's decisions. *See, e.g.*, *Constitutionalizing Communications*, *supra* note 1 at 131, n.109, citing 83 BVerfGE 238, 315 (1991); *see also* 73 BVerfGE 118, 152 (1986). The Article 5 jurisprudence is also treated in CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 77-81 (1993) (discussing the specifics of German media jurisprudence); OWEN FISS, THE IRONY OF FREE SPEECH 6 (1996); John David Donaldson, *"Television Without Frontiers": The Continuing Tension Between Liberal Free Trade and European Cultural Identity*, 20 FORDHAM INT'L L.J. 90, 143 n.308-09 (1996) ("Europe to a large degree still requires broadcasters to fulfill a public task obligation"); Stephen A. Gardbaum, *Broadcasting, Democracy and the Market*, 82 GEO. L.J. 373, 395-96 n.50 (1993); Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 297 n.124-25 (2003). For a wide-ranging discussion and

Amendment is cast in the negative, Article 5 is phrased in the affirmative, and contains an express guarantee of free media:

> Everyone has the right to freely express and disseminate his opinion by speech, writing and pictures, and to inform himself from generally accessible sources without hindrance. Freedom of the press and freedom of reporting by broadcast and film are guaranteed. There shall be no censorship.[4]

Despite these differences, both constitutions are animated by similar democratic concepts; indeed, the Americans and their World War II Allies were at least partially responsible for Germany's post-war constitutional scheme, and insisted in particular that broadcasting be free from both government influence and commercial capture.[5]

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comparison of the British, French, Italian, and United States' approaches to broadcasting, see ERIC BARENDT, BROADCASTING LAW, A COMPARATIVE STUDY (1993).

4. Grundgesetz für die Bundesrepublik Deutschland [hereinafter Basic Law] Article 5, paragraph 1, May 23, 1949, REICHSGESETZBLATT, *available in English at* https://www.btg-bestellservice.de/pdf/80201000.pdf and http://www.iuscomp.org/gla/statutes/GG.htm, *in German at* http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf (*"Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt"*); *see also* DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 404-15 (2d ed., 1997). Paragraph 2 of Article 5 provides that these "rights shall find their limits in the provisions of general laws," *e.g.*, in the provisions for the protection of young persons. Paragraph 3 provides for the related freedoms of art, scholarship, research and teaching.

5. After the war, Americans joined their allies in insisting that the new broadcasting bodies be decentralized and free of state influence: "It is a basic policy of the U.S. Military Government that the control of the means of public opinion such as press and broadcasting be widely distributed, and free of government control." November 21, 1947 Order of the American Military Governor Lucius Clay, *reprinted in* H. BAUSCH, RUNDFUNKPOLITIK NACH 1945 (1980) at 34 (translated from the German). The British were of a similar mind. BBC journalist Hugh Carlton Greene, who was assigned to lead the Northwest German Broadcasting Co. in Hamburg, told his German colleagues, when first he met with them in 1946:

> This broadcasting company must never become a party broadcaster, or a government broadcaster, or the mouthpiece of commercial interests. If I could sum up the policy of this broadcaster in two words, they would be dispassionate substantiveness and objectivity (*Sachlichkeit und Objektivität*) in all areas.

Arnulf Kutsch, *Unter britischer Kontrolle, Der Zonensender 1945-1948, in* DER NDR ZWISCHEN PROGRAMM UND POLITIK; BEITRÄGE ZU SEINER GESCHICHTE 120 (Kohler, ed. 1991); *see also* Libertus, *Essential Aspects Concerning the Regulation of the German Broadcasting System* 4 (*Rundfunk Insitut Köln*, Working Paper No. 193, 2004), *available at* http://www.rundfunk-institut.uni-koeln.de/institut/pdfs/19304.pdf, at 4 ("[I]t was the British BBC that served as a role model, exemplifying impartial broadcasting . . . . In light of the fresh memories of the abuse of broadcasting by the

The German Constitutional Court has taken this "free and democratic" framework much further than its U.S. counterpart.[6]

As in the United States, the German Court has been vigilant in detecting and forbidding government actions that might chill the speech of its citizens. Unlike the United States, however, the German Court does not limit its gaze to the vertical relationship between the state and the citizenry, but extends its free speech thinking to the horizontal dimension of "private" or contractual relationships among people or groups in society. This enables the German Court to see potential dangers to speech emanating from the private sector (what has been called - and is discussed below as "private censorship"), as well as from the government. In Germany, the Constitutional Court has required legislators to take affirmative steps to protect speech - understood as the free flow of information and opinion in society - from both private censorship and state control.

Also unlike the United States, the Germans have escaped from what might be called a speaker fixation, one that renders the First Amendment into a "freedom of the speaker" rather than a "freedom of speech." As we will see, at the heart of the net neutrality debate is the question of whether a network owner is *ipso facto* a speaker, and the question within the question of whether the mere transmission of bits can be considered speech. The post-war German understanding of "speech" as a process at the core of a democratic state helps clarify these definitional questions.

Although the German jurisprudence of communications freedom grew largely in the press and broadcast contexts, the German Court's constitutionalism provides a theoretical framework

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National Socialists, however, an effort was made to ensure even greater independence from the state with institutional and legal approaches than was the case with the BBC."); *cf.* 12 BVerfGE 205, 210 (1961) ("[T]he western occupation forces pursued a policy of excluding all government influence on broadcasting."); *see also Constitutionalizing Communications, supra* note 1, at 111-13.

6. *See, e.g.*, 74 BVerfGE 297, 337 (Fifth Decision, 1987) ("laws of general applicability to be interpreted in recognition of the importance of the basic rights found in Article 5, paragraph 1 of the Basic Law for a free and democratic state") ("*die allgemeinen Gesetze sind aus der Erkienntnis der Bedeutung der Grundrechte des Art. 5 Abs. 1 GG im freiheitlichen demokratischen Staat auszulegen*"); *see also Constitutionalizing Communications, supra* note 1, at 113-16. English translations of this and other Constitutional Court speech decisions are available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/table.php?id=131.

rich in implications for any number of issues and institutions in a world where - increasingly, and in different ways - information is power. "Information wants to be free" may be a hoary cliché from the 1960s, a battle cry of uncertain provenance and import,[7] but information freedom as a constitutional mandate suggests new approaches in a number of different areas: copyright;[8] antitrust;[9] telecommunications; consumer protection; education; and a host of other public and private issues and undertakings. My specific undertaking here is to consider how a right or value of information freedom might apply to the case presented by net neutrality regulations requiring nondiscrimination, no blocking, and transparency in network practices.

At a basic and colloquial level, I use the term information freedom to mean access to information. The importance of information access is reflected in its value in the marketplace (see Bloomberg and Google), as well as its essential role of information in forming our world view and framing our decision-making. While the German usage comes from specific Court decisions regarding *Informationsfreiheit*, the concept is also informed by international treaties, policy statements of the United States, the

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7. A 2012 Lexis search for law review articles containing this phrase yielded 317 results. The phrase is generally attributed to Stewart Brand. *See* JOHN MARKOFF, WHAT THE DORMOUSE SAID 286 (2005) (quoting Brand,"Information wants to be free. Information also wants to be very expensive"); *see also* STEWART BRAND, THE MEDIA LAB: INVENTING THE FUTURE AT MIT 201 (1988).

8. *See* Eldred v. Ashcroft, 537 U.S. 136, 220-21 (2003) (rejecting First Amendment challenge to 20-year copyright extension, without considering the First Amendment information rights of consumers whose access to that information might now be truncated); *compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("[i]t is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here"); *see* further discussion of the rise and fall of *Red Lion* in Part V *infra*.

9. *See, e.g.*, Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. REV. 249, 252 n.14-16 (2001), arguing that "The antitrust laws . . promote the marketplace of ideas by reaching anticompetitive *private* restraints on this marketplace," (citing FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 800 n.18 (1978) ("application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment"), and Associated Press v. United States, 326 U.S. 1, 20 (1945); *but see* Verizon Communications v Trinko, 540 U.S. 398, 416 (2004) (violation of network-sharing and competition elements Telecommunications Act not antitrust law violation, no mention of First Amendment); Pac. Bell Tel. Co. dba AT&T v. Linkline, 555 U.S. 438, 457 (2009) (antitrust claim by Internet Service Providers alleging AT&T's anticompetitive conduct in the wholesale DSL market, dismissed for failure to state a claim, no mention of First Amendment).

writings of Jürgen Habermas and others, and by an alternative (and at times seemingly underground) strain of domestic First Amendment interpretation.

This article follows on *Constitutionalizing Communications,* a detailed examination of the particulars of German broadcasting, information and communications jurisprudence as of 2010.[10] This paper takes the next step, exploring what lessons the German communications constitutionalism might hold for domestic consumption. It is increasingly apparent that a key issue today, both at home and abroad, is the struggle around issues of information access and control. And this is occurring on an increasingly globalized communications system.

This writing is in some respects deeply contrarian. Today's communications landscape - and when we talk about information, we are talking primarily about the *communication* of information - is increasingly driven by economic models. *Constitutional* values (self-government, for example) are everywhere in retreat - in the United States, in the European Union, and further abroad - before the imperatives of the market and/or geopolitics, despite rhetoric by policymakers to the contrary.[11] The Supreme Court's most important communications case in the last forty years - the *Brand X* decision, which moved the Internet from its historical common carrier substrate to something far more nebulous - failed to even mention the First Amendment.[12]

When constitutional values do enter the communications debate, they are most often asserted in favor of the rights of communications network owners. Thus, Verizon recently argued in the D.C. Circuit that the FCC's Open Network Order (announcing limited network neutrality rules) "infringes broadband network owners' constitutional rights [and] violates the First Amendment by stripping them of control over the transmission of speech on their

10. *Constitutionalizing Communications, supra* note 1.

11. *See, e.g.,* discussion in Part III.C; *see also* Part III.B, regarding the fight for information freedom language in the European Charter of Human Rights.

12. Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Services, 545 U.S. 967, 980 (2005) (deferring to the FCC's decision that cable modems [and later DSL modems] were not "common carrier" telecommunications facilities, but rather much less regulated information services; this effectively moved the Internet from a common carrier foundation to the quicksand of the free market); *see also* underlying FCC decision, High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002) [hereinafter Cable Modem Ruling].

networks. And it takes network owners' property without compensation."[13]

One can ask whether the language of ownership and market economics is sufficient to describe how information is used in the public sphere today, how that is changing, or how it is changing us. Might we do better to ask what democracy demands, or at least to make social and political questions coequal with those of economics? This is precisely the question the German Constitutional Court asks in its broadcasting and information decisions. The German Court has advanced the following concepts that might be useful in our domestic debate:

- free speech (or communications freedom) protects not only individual speakers, but also the *process* of speech; [14]
- constitutional free speech must provide some guarantee that electronic media (in particular) will take up and pass along "the diversity of themes and opinions that play a role in society";[15]
- government has a constitutional duty to act positively to create structures that protect this communication;[16]
- constitutional values can and sometimes should have a "radiating effect," i.e., should be considered when implicated by more quotidian legal endeavors such as statutory interpretation and/or market regulation;[17] and
- censorship can emanate from private markets as well as governments.[18]

While some of these ideas might sound radical to American ears, they are in fact the constitutional framework for a democratic state with a strong market economy. Nor are they entirely unheard of on our shores.[19] The United States is on record internationally as supporting the free flow of information as a necessary concomitant

13. Opening Brief for Petitioners Verizon and MetroPCS at 3-4 ,Verizon v. FCC, No. 11-1355 (D.C. Cir. 2012), *available at* http://gigaom2.files.wordpress.com/2012/07/verizon-metropcs-net-neutrality-brief-as-filed.pdf. [hereinafter Verizon Brief].

14. *Constitutionalizing Communications, supra* note 1, at 125, 129.

15. *Id.* at 125-26.

16. *Id.* at 126, 129.

17. *Id.* at 127-28.

18. *Id.* at 138-43.

19. *See supra* note 3 and U.S. policy statements in Part III.C *infra*.

to democracy. The rhetoric, however, does not always match domestic legal and economic reality. By considering the distance between the two, by examining how the "no law" of the First Amendment plays out in practice, particularly when thrown into relief by the more affirmative German approach to freedom of speech, we may be able to reprogram our understanding of the First Amendment and of what is at stake in this Information Age. The notion of a "fresh," new, or reconstructed understanding of the First Amendment will undoubtedly send shudders down the spines of constitutional scholars who worry about "slippery slope" problems, but the fact that Germany's different approach to speech has not in fact led to a collectivist nightmare may give them some comfort.[20]

I am hardly the first to attempt this analysis.[21] My hope is to bring some new material into the discussion, specifically the German and international approaches to freedom of information and communication, and to connect constitutional theory with a view of current legal and administrative practice.[22] I begin the analysis in Part II below with a discussion of communications and constitutions generally, and preface that with a sketch of the layered nature of today's electronic network; I then turn to speculation about why architectural decisions about that network have not yet been constitutionalized, and why they should be. Part III provides a syncretistic construction of information freedom, borrowing from the German Constitutional Court, international treaties, U.S. policy

20. John McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 122 n.304 (1996) ("growing realization that most of the truths emerging from contemporary social inquiry are not hospitable to collectivist and egalitarian ideals. Greater regulation of speech may thus retard competition from these rising ideas"); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1119-20 (1993) ("The collectivist theory, therefore, stands for the subordination of public discourse to a framework of managerial authority.").

21. For two quite recent, competent, and diametrically opposed views on "no law" vs. "free speech" interpretations of the First Amendment, *see* Christopher Yoo, *[Individual Rights:] Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747 (2011); *see also* Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1 (2012). *See also* Stuart Minor Benjamin, *Transmitting, Editing and Communicating: Determining What "the Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673 (2011); and Christopher Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV 697 (2010).

22. The author has participated as a staff attorney for the California Public Utilities Commission in various interconnection disputes, merger proceedings, and telecommunications consumer protection proceedings. The views advanced in this article are, again, his own.

statements, philosophical treatises, and U.S. law. Part IV situates information freedom in the larger field of German communications jurisprudence, summarizing what is set forth in greater detail in *Constitutionalizing Communications.* Part V traces the rise and fall of information freedom in U.S. law (a "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"), as well as the eventual dominance of the "negative freedom" model of the First Amendment.[23] Part VI offers criticism of the affirmative speech model, specific suggestions as to how a useful and adequate domestic free speech regime might incorporate the principles of information freedom, and what the road forward might entail.

II. Constitutions and Communications

A. The Constitutional Vacuum Around Communications and Communications Law

The FCC and the Courts have issued a number of significant decisions in recent years that define the communications substrate of the Internet, and that are either entirely devoid of discussion of the First Amendment, or present a truncated and one-sided view of it.[24] To grasp the enormity of this failing, one must understand what we talk about when we talk about the Internet and its communications substrate, which is the specific case on which this paper focuses.

The Internet may be a "forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,"[25] but all that good stuff

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23. The quotation is from the paradigmatic U.S. information freedom case, *Red Lion,* discussed *supra* note 8. The clash between negative and affirmative freedom models is described in Part II.C *infra.*

24. *See supra* note 12. The *Brand X* case failed to even mention the First Amendment, and the underlying Cable Modem Ruling refers only to the First Amendment rights of network owners. Any number of other seminal communications decisions, which structured the communications substrate for the Internet, could be mentioned here. *See,* in place of many, National Broadband Plan, 24 FCC Rcd 4342 (2009), which initiated the Obama Administration's broadband buildout, with no mention of the First Amendment.

25. Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (quoting 47 U.S.C. § 230(a)(3), sometimes referred to as Communications Decency Act). Interestingly, section 230 also states that the services available over the Internet "represent an extraordinary advance in the availability of educational and informational resources to our

does not just happen. Calling the Internet a "cloud" does not help, and may be misleading. In a physical sense, the Internet runs on wires. As one of its pioneers put it, "One of the things about the Internet that escapes a lot of people . . . is that it really is composed of things like routers and lines and computers and the like."[26] Initially, and to a large extent still today, these wires and hardware were constituent parts of a common carrier telephone system, sometimes still quaintly referred to as the public switched telephone network (PSTN).[27] Wireless broadband may deliver an increasing share of Internet content, but it is significantly slower than wired

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citizens," and "offer users a greater degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops." 47 U.S.C. §§ 230(a)(1)-(2). Here again, however, there is no reference to the First Amendment, and the paean to the wonders of the Internet shortly gives way to the statutory assertion of a "competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulations," and finally to provision of immunity for any ISP that takes "action voluntarily in good faith to restrict access to . . . material that the provider or user considers to be obscene . . ." 47 U.S.C. § 230(b)(2), 230(c)(2)(A). Years later, the D.C. Circuit would reject section 230 as the basis for Commission action to prevent a network provider's blocking or discrimination among Internet traffic. Comcast v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) (the FCC, having rejected common carrier treatment of cable modems, could not then invoke section 230 to establish "ancillary jurisdiction" over the modem service).

26. Robert Kahn, at 2007 Silicon Flatirons Conference, *as quoted in* Susan P. Crawford, *The Digital Broadband Migration: Digital Think,* 5 J. TELECOMM. & HIGH TECH. L. 467, 468 (2007).

27. The Internet has, from its infancy in the late 1960s as a Department of Defense project though its mass commercialization in the 1990s, run largely on the common carrier facilities of the telecommunications networks. *See, eg.,* Christopher Yoo, *Network Neutrality and the Economics of Congestion,* 94 GEO. L.J. 1847, 1882 (2006) ("the Internet began as an overlay on top of a voice network"); Jay P. Kesan & Rajiv C. Shah, *Fool Us Once, Shame on You - Fool Us Twice, Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone and Domain Name System,* 79 WASH. U. L. REV. 89, 101. (2001) (history of the evolution of ARPANET to CSNET to NSFNET in the late 1980s, and increasing privatization of network as Sprint, Pacific Bell, and other carriers took control of critical network access points or NAPs); *see also* Kevin Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces Tearing It Apart,* 42 U.C. DAVIS L. REV. 343, 398 (2008) ("The Internet and the public switched telephone network ('PSTN') use the same physical infrastructure"); Michael Kende, *The Digital Handshake: Connecting Internet Backbones,* 1 COMMLAW CONSPECTUS 45, 45, 51 n.59 (2003) (Internet as "network of networks, owned and operated by different companies, including Internet backbone providers" AT&T and others); Merger of SBC Communications Inc. and AT&T Corp. , 20 FCC Rcd 18290 (2005), at ¶ 123 (referring to "Tier 1 backbone providers - AT&T, MCI, Sprint, Qwest, Level 3, [and] Global Crossing"), and ¶ 108 ("the merger may result ... in significant vertical integration").

broadband, and is in fact wireless only over the last mile.[28] Upstream, wireless traffic runs largely on the same wires that deliver home and business telephony and broadband.[29] Telephone and broadband are services on these wires.[30] The wires and their appurtenances (routers, utility poles, conduits and the like) are often referred to as the "physical layer" of the Internet.[31] The Telecommunications Act of 1996 was supposed to usher in competition at the physical layer; many observers believe this promise has not been realized, and that significant market power bottlenecks have ensued at the hardware or facilities level.[32]

Variously described service and application layers ride on this physical layer; content rides on the top.[33] Whoever controls the

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28. As used here, wireless broadband refers primarily to broadband as delivered to handheld devices. Susan Crawford, *The Communications Crisis in America*, 5 HARV. L. & POL'Y REV. 245, 247 (2011) (neither slower wireless broadband nor satellite Internet access, nor "pipedream" of broadband over power lines, likely to compete directly with cable broadband; telecommunications companies have fallen behind).

29. *See, e.g.*, California Public Utilities Commission Order Instituting Investigation I.11-06-009, *In re AT&T/TMobile Merger*, at 2 (re "backhaul"); *available at* http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=453777. The author was an advisor to the Commission for this proceeding.

30. *See, e.g.*, Richard Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMMLAW CONSPECTUS 417, 427 (2009).

31. *See, e.g.*, Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207, 213 (2003). Frieden describes a "hierarchy of identifiable layers involved in the provision of information and telecommunications, including a network/physical layer (the wired, wireless, or optical medium), services carried over such networks (one-way, two-way, narrowband, or broadband), and applications/content (voice, data, video, or Internet) riding at the top of the layered stack." *Id.*

32. *See, e.g.*, Lee Selwyn & Helen Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 FED. COMM. L.J. 91, 120, *passim* (2010) ("if we have learned nothing else over the fifteen years since adoption of the 1996 Act, it is that such entry [into 'facilities-based mass market broadband competition'] is not economically viable").

33. *See* Direct Testimony of Jeffrey Richter, *in* Petition of AT&T Wisconsin for Declaratory Ruling that Its "U-Verse Voice" Service is Subject to Exclusive Federal Jurisdiction, Wisconsin Public Service Commission Docket 6720-DR-101 (filed Nov. 14, 2008), at 8-9 ("The OSI 7 Layer Model defines the relationship between the application (at the top) and the physical hardware (at the bottom); The TCP/IP model [in contrast] uses four layers"), *available at* http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=104378. *See also id.* at Exhibit 1 (illustrating the seven layers of the OSI Model, with physical layer at bottom and applications layer at top, with "each layer functionally independent of the others, but provid[ing]

physical layer can exert control over the higher layers.[34] A separation of the physical transport layer on the one hand, and the service and content layers on the other, has seemed to many observers the obvious and optimal organization for next generation networks (NGNs):

> Electronic communications networks [are] becom[ing] packet switched, mostly or completely based in the IP. They will be multi-service networks, rather than service specific networks for audio (including voice), video (including TV-services) and data networks, allowing a decoupling of service and transport provision. . . A core feature of IP networks is the separation of . . transport and service. This distinction potentially allows competition along the value chain more easily than in the PSTN world. A crucial point is the adoption of open and standardized interfaces between each functional level in order to allow third parties to develop and create services independent of the network.[35]

In other words, IP is the *lingua franca* which allows many different services, and a world of content, to ride on what is currently, and will hopefully remain, *one* unitary, interconnected public electronic network.[36] It is becoming increasingly meaningless to talk of a telephone network or a cable system or radio or television network - these are all applications or services on a converged network. It is this interconnection and convergence that allows the prospect of ubiquitous, universal, and affordable

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service to the layer above it, and receive[ing] service from the layer below it"), *available at* http://psc.wi.gov/apps/erf_share/view/viewdoc.aspx?docid=104379.

34. Richard Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587, 647 (2004) (re "lower level control": "an entity's control over unique elements of the Physical Layer and its resulting control over higher layers in the protocol stack" leads to a situation where "he who controls the lower layers also can control the dependent upper layers").

35. ERG Consultation Document on Regulatory Principles of IP-IC/NGN Core (ERG 08) 26rev1, at 96-97. The Consultation Document is available at http://berec.europa.eu/doc/publications/erg_08_26_final_ngn_ip_ic_cs_081016.pdf.

36. *See generally* Werbach, *supra* note 27, (discussing threats to the interconnected network). The FCC has acknowledged the move to IP-based networks in many recent rulings, including its *NBP Public Notice No. 25* seeking comment on the *Transition from Circuit-Switched Network to All-IP Network.* Public Notice DA 09-2517 (rel. December 1, 2009), at 1-2, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2517A1.pdf.

communications *and access to information.*[37] It is also this interconnection and convergence that underline the significance of market concentration, as discussed below. Despite the central role of this network in our lives, few of the seminal network-structuring decisions mention the First Amendment rights of network users.

In 2002 , for example, in the arcane recesses of an administrative proceeding, the FCC determined that cable modem service, and with it the broadband connection to the home (or office), was not a common carrier telecommunications service, but rather a lightly regulated information service.[38] But the FCC did not consider the impact of this decision on the information rights of consumers; the only First Amendment rights mentioned were those of the network owners.[39] There is a direct line from that 2002 decision deregulating the facilities substrate to the network neutrality debate of today.

When that case reached the Supreme Court as *National Cable & Telecommuncations Association (NCTA) v. Brand X Services,* the Court "deferred" to the FCC's decision (under the *Chevron* deference doctrine), without looking too closely at the FCC's decision or its impact, and without considering the First Amendment at all.[40] After *Brand X* issued, the FCC extended its "information service" category to DSL broadband, again without mention of the First Amendment.[41]

Even where the First Amendment is mentioned in FCC and court proceedings, it is often the First Amendment as applied to the

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37. Built into the concept of "ubiquitous, universal, and affordable" is the question of the "digital divide" between the information access available to middle- and upper-income people, and that available to lower income individuals, a problem state and federal legislators and regulators have sought so solve through universal service mechanisms. *Cf.* Werbach, *Connections: Beyond Universal Service in the Digital Age,* 7 J. TELECOMM. & HIGH TECH. L. 67, 68 (2009) ("Subsidy mechanisms to enhance ubiquity should be linked to obligations to preserve the unitary nature of the Internet").

38. High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd 4798 (2002) [hereinafter Cable Modem Ruling].

39. *Id.* ¶ 80 ("Many commenters have debated whether a federally-mandated system of multiple ISP access would violate the First Amendment rights of cable operators").

40. Nat'l Cable & Telecomm. Ass'n v. Brand X Services, 545 U.S. 967, 980 (2005).

41. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14853 (2005) [hereinafter DSL Modem Order] (DSL modem not common carrier telecommunications service).

rights of the network owner, not the network users.[42] Sometimes one detects a confusion in network cases as to who the speaker or protected party is - the network owner, the content provider using the network to reach an audience, or the audience which "consumes" the content.[43] In antitrust cases addressing the facilities bottleneck, the First Amendment is again largely missing in action.[44]

This absence of First Amendment analysis, and more particularly of an analysis of the speech and information rights of network users, extends to scholarly works as well, even those written by proponents of the information consumer.[45] All of this

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42. *See, e.g.*, Matter of Framework for Broadband Internet Service, 25 FCC Rcd. 7866, ¶ 54 (June 2010) ("Are there First Amendment constraints on the Commission's ability to compel the offering of such a [broadband common carrier] service?") [hereinafter "Reclassification Notice"]; *see also* Cable Modem Ruling, *supra* note 38.

43. *See, e.g.*, discussion of *Reno v. ACLU* and *United States v. American Library Ass'n.*, *infra* Part V.D.

44. *See* Verizon Communications v. Trinko, 540 U.S. 398 (2004); Pac. Bell Tel. Co. dba AT&T v. Linkline, 555 U.S. 438 (2009). *See also* discussion in Part V.F *infra*. *Compare Springer/SAT1* merger discussed *infra* in Parts IV.C and VI.C.

45. Thus, in the seminal article on network neutrality by Professors Lemley and Lessig, *The End of End-to-End*, the First Amendment is not mentioned in the text proper, although it crops up in the footnotes. Mark A. Lessig & Lawrence Lemley, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001). Christopher Yoo's equally seminal anti-network neutrality essay mentions the First Amendment only once in its text, and then only to assert the First Amendment rights of telephone companies. Christopher Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 49, n.180 and accompanying text (2005). Much of the work of even insightful network neutrality proponents such as Susan Crawford more often than not argues from economics or general public policy grounds, rather than from the First Amendment per se, a fact noted by Prof. Yoo. Yoo, *supra* note 27, at 1851 n.13 ("Since network neutrality proponents defend their proposals almost exclusively in terms of the economic benefits of innovation, this Article discusses the issues solely in economic terms. I therefore set aside for another day any discussion of noneconomic issues, such as network neutrality's implications for democratic deliberation or the First Amendment"); *see also Constitutionalizing Communications*, *supra* note 1, at 102 n.16. Clearly there are counter-examples (see works of Professor Lessig cited herein), but in some instances they prove the point that the First Amendment is in retreat from this most important issue. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 167 (1999) ("egalitarian regimes - the Scandinavian countries - puzzled over how we could think of ourselves as free when only the rich can speak and pornography is repressed . . . . We have exported to the world, through the architecture of the Internet, a First Amendment *in code* more extreme than our own First Amendment *in law*") (emphasis in original); *cf.* Hannibal Travis, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: of Blogs, EBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1526 *passim* (2007) (effort to reclaim the First Amendment under the "rubric of originalism [which]

indicates the lack of a fully-theorized First Amendment, and the lack of a constitutionally urgent case for information and its users.

There may be many reasons why communications cases are often decided in a constitutional vacuum, but three come immediately to mind: the common carrier heritage of the communications substrate; the inherent difficulty of free speech theory (and its "incompletely theorized" development in this country as set forth in Part V.D below); and - most importantly - the "no law" libertarian or negative freedom interpretation of the First Amendment, with its concomitant "state action" requirement.

As to the first reason, communications facilities were traditionally regulated as common carriers, and it appears not to have occurred to the telephone companies (initially, at least) that they might gainfully assert their own First Amendment rights in their systems.[46] It was generally accepted that telegraph and telephone transport systems were natural monopolies, that they should therefore be operated as common carriers, that they needed public facilities (streets and publicly authorized easements) to provide a public service, and that a guaranteed 10% to 12% return on investment was not an unfair bargain. As the Internet matured, the notion of a state-set return on investment paled against the almost unimaginable amount of surplus value that could be created by those transport systems, and all bets were off.

The second reason for the constitutional vacuum is the difficulty of First Amendment theory. To begin with, it is difficult to square the "no law" part of the speech clause with the notion that it is a "free speech guarantee."[47] This is a recurring theme in much of

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provides the most persuasive, consistent, and principled basis on which to establish First Amendment limits to efforts by private entities to censor digital media using government-issued monopolies").

46. *See* Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N. C. L. REV. 1071 (1992); Susan J. Ross, *First Amendment Trump? The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video*, 50 FED. COMM. L.J. 281, 288-89 (1998) ("Although the telephone industry had been regulated as a carrier of others' goods for most of a century, by the mid-1990s, telephone companies had assaulted regulations, which confined them to serve as pure vehicles, with a barrage of lawsuits claiming a First Amendment right to provide content as well") (citations and footnotes omitted). *See also* DSL Modem Order, 20 FCC Rcd 14853 (2005) (DSL modem [previously understood as telecommunications facility] reclassified as information service).

47. *See, e.g.*, Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 935 and n.24 (2008) ("no law" means that "freedom of speech is 'not applied to the very interests which have real power to effect such abridgment'"

what follows. Then there is a sort of constitutional uncertainty principle at work - the more one attempts to parse it, the more elusive the First Amendment's meaning becomes. As discussed below, different interests may collide on the media platform, some of those interests have been described as individual rights, some as "public" interests or rights. The interplay of different personal and public rights and interests in communications cases has created what has been called a First Amendment "Mobius Strip,"[48] what Professor BeVier calls a "doctrinal and scholarly cacophony."[49] One can only speculate that all the sound and fury occur because observers sense that what is at stake is more than whose wire runs through what conduit, but has something to do with the future shape of our culture.[50] Add to that the increasingly technical details

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(quoting Jerome A. Barron, *Access to the Press A New First Amendment Right*, 80 HARV. L. REV. 1641, 1656 (1967)).

48. William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539, 574-75 (1978).

49. Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280 (2005). An oft-cited example of these doctrinal difficulties are the seven different concurring and dissenting opinions in Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 768-838 (1996), grappling with the interplay of rights regarding access to the cable television platform.

50. Different cognitive architectures can act as filters or membranes circumscribing the available pool of information and ideas. *See, e.g.*, Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695, 696 (2005) ("choice in the current Internet governance debate between open platforms, open devices, and diversity, on the one hand, and constrained platforms, constrained devices, and monocultures, on the other"). My experience, living in West Berlin in the late 1970s, and watching three channels of West television along with two channels of its counterpart from the East (the so-called German Democratic Republic), brought home to me how communications media shape culture. Both the East and West television were self-contained worlds, with vastly different value systems, frames of reference, and information membranes. East German television broadcast *Cabaret* on Easter Sunday, for example, while West German television tended more to devotional services on that day. It was not surprising that when the Berlin Wall came down, there were two cultures where before there had been one, an effect most pronounced where the Easterners were outside the reception zone of West television. *See generally* INGO SCHULZ, SIMPLE STORIES (1998). The ambivalence ot technology in the abstract is reflected in the writings of James Boyle who revels in the joys of a cyber-libertarian in an information utopia, but also sees that the very "technologies of liberation" that provide this information abundance may lead to more efficient and powerful mechanisms of surveillance, and state and private forms of "discipline." James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 204 (1997).

of new electronic communication networks,[51] and the carriers' aggressive actions to keep that information confidential,[52] and it is no wonder that there is confusion among policy-makers, legislators and jurists about the semantics and operational realities of these networks.[53]

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51. The so-called "expert" agencies suffer from what has been referred to as "information asymmetry" - industry knows how these systems work, while the administrative agencies do not. *See, e.g.*, Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 281 *passim* (2004) ("asymmetries between regulators and those they regulate"); *see also* FCC docket 05-25, *In re* Special Access for Price Cap Local Exchange Carriers, regarding special access (business last-mile and "middle mile" lines), where the FCC has been attempting to gather basic information for almost ten years; *see also* Petition for Writ of Mandamus, Comptel et al. v. FCC, No 11-1262 (D.C. Cir. July 15, 2011) (competitive carriers alleging that the FCC had "dragged its feet" for over a decade on special access, "a critical part of our national telecommunications infrastructure," and done nothing about the problem that "[i]n most locations, special access services are owned and controlled exclusively by a single entity - one of the three dominant incumbent local exchange carriers ('ILECs'), AT&T, Verizon or CenturyLink/Qwest"). No one knows precisely how concentrated the market is, because in many instances the expert agencies have retired their engineers and accountants and replaced them with freshly minted MBAs, and because of "regulatory capture" which makes the agencies too timid to insist that the regulated entities provide the information that is needed for reasonable decision-making; *cf.* Herbet Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801, 825 (1999) ("In addition to the expansive literature on regulatory capture ... regulated firms faced grossly ineffective oversight by their regulators, who often did little more than rubber-stamp their requests"); *see also infra* note 52.

52. As one example among thousands, see FCC's February 13, 2012, letter to Verizon *In re Special Access for Price Cap Local Exchange Carriers*, Report & Order, FCC WC Docket No. 05-25, discussing confidential, "highly confidential," and "enhanced confidentiality" categories, rejecting *inter alia* Verizon's claims for confidential treatment of public documents, but allowing Verizon to treat "the total number of intrastate and interstate circuits purchased," "descriptions of CLEC or out-of-region ILEC sales, pricing structures and discounts," and collocation data as "highly confidential," *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-199A1.pdf. Roughly half the documents filed in the AT&T-T-Mobile merger investigation at California Public Utilities Commission were filed under seal. *See* http://delaps1.cpuc.ca.gov/CPUCProceedingLookup/f?p=401:57:1304589101695901::NO.

53. The classic statement of this confusion is Justice Scalia's "pizza analogy" in *Brand X*. In his dissent, he deconstructs the majority's (and the FCC's) conflation of the content and transport layers of broadband modem service:

> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," . . would prevent them from answering: "No, we do not offer delivery - but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to your house, we are not actually 'offering' you delivery,

The third, and by far the most daunting, barrier to a fully constitutionalized understanding of communications is the "no law" command of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech." It is on the "no law" issue that agreement about the meaning of the First Amendment breaks down, and a substantial gulf opens between those who put the emphasis on "no law" and those who put the emphasis on "freedom of speech."[54] There is an inherent tension between the two ends of this clause: Those who focus on "no law" believe that the First Amendment goes no further than protecting the individual from laws, i.e., *from direct government censorship* of the individual's speech (the "negative freedom" interpretation of the First Amendment); those who focus on the "freedom of speech" end of the clause tend to think the First Amendment extends to the public's right (and the right of each individual comprising the public) to *hear* or *receive* that speech, to determine and reach the information they think is relevant, often within or with reference to a process of public discourse and decision-making. This is sometimes referred to as an "affirmative" view of the First Amendment, and generally comes with a belief that government may (or should) act to protect the availability and reception of that speech and information.[55]

If constitutional speech protection is limited to the negative freedom model, i.e., to the vertical relationship between an individual and his or her (or its)[56] government, there is a natural

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because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'"

545 U.S. at 1007 (internal citations omitted). Similar confusion between the service and transport layers of the now-converging network surfaces in legislation that bans state regulatory jurisdiction over VoIP and "IP-enabled services," while purportedly allowing continued state oversight over traditional phone services delivered over those same telephone lines, and remaining vague and ambiguous as to the level of remaining state oversight of facilities. *See, e.g.*, S.B. 1161, 2012 Leg. (Cal. 2012), *available at* http://leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_1161&sess=CUR &house=B; *see also* Susan Crawford, *Torching California's Broadband Future: Why Your State Is Next*, WIRED.COM (Aug. 27, 2012) (discussing S.B. 1161), http://www.wired.com/business/2012/08/torching-californias-broadband -future-why-your-state-is-next/.

54. The "no law" theories are sometimes referred to as focusing on "negative freedom," libertarian, liberal, or subjective; the "freedom of speech" theories are sometimes referred to as "affirmative freedom," democratic, republican, or objective. *See* discussion *infra* in Part II.B.

55. *See* more extended view in Part II.C *infra*.

56. *See generally*, Citizens United v. FEC, 130 S. Ct. 876 (2010).

contraction of the work that the constitutional protection can do, adding to the vacuum effect.[57]

In regulatory and judicial decisions which have adopted the negative freedom model, the focus tends to be on the network owner as *the* speaker for constitutional purposes;[58] in the affirmative view, the owner shares the spotlight with the users of his/her/its network.[59] When the First Amendment focus is primarily on the network owner, millions of network users - speakers and information recipients - are either not in the picture, or lurking out-of-focus at the periphery.

B. Constitutionalizing Communications

The U.S. Constitution embodies "self-government" and the "fundamental principle of representative democracy."[60] Democracy

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57. The affirmative camp argues that, if speech protections are extended to the horizontal dimension, to relationships between people and entities "in society," then more speech and information is protected; an individual's speech and information rights would be protected not just from government, but also *vis a vis* powerful private entities, particularly networks designed to carry speech. *See, e.g.*, Harold Feld, *Whose Line Is This Anyway?*, 8 COMMLAW CONSPECTUS 23, 24 (2000) (suggesting "virtual easement" for information in return for cable's use of streets). Those who believe the most immediate threats to speech today emanate not from government but from the private sector often cite SBC/AT&T chairman Ed Whitacre's infamous comments about not allowing unaffiliated content providers to "use my lines for free." *See Rewired and Ready for Combat*, BUSINESSWEEK.COM (Nov. 6, 2005), http://businessweek.com/stories/2005-11-06/rewired-and-ready-for-combat. This is essentially the posture of Verizon in the network neutrality appeal in the D.C. Circuit.

58. *See, e.g.*, City of Los Angeles v. Preferred Comm'ns, 476 U.S. 488, 494-95 (1986) (cable operator's activities "implicate First Amendment interests" because of asserted "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire");Turner Broadcasting. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (*Turner I*) (same). Susan Crawford discusses how the "romantic author" trope has been borrowed from copyright exegesis and fitted to the cable owner as speaker, now become the "romantic builder" of networks in negative liberty apologetics. Susan Crawford, *Network Rules*, 70 LAW & CONTEMP. PROB. 51, 54 (2007) ("In the current network neutrality debate, network providers claim that they (the romantic builders) must be allowed by law to price-discriminate vis-à-vis content sources in order to be encouraged to build the network (or to continue supporting it")).

59. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

60. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1994) (it is a "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'") (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969); Vieth v. Jubelirer, 541 U.S. 267, 356 (2004) (Stevens, J., dissenting) ("the workable democracy that the

demands communication. Or, as the German Court would have it, democracy demands public opinion-building (consensus-building), and public opinion-building demands communication.[61]

At the nexus of communications and democracy, i.e., at the core of the self-government project, is an Enlightenment belief in reason.[62] The hope is that, given sufficient information, the public can reason to better solutions, and can effectively govern itself.[63] The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[64] "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[65]

The connection between communication and community, and communications' central role in the body politic, cannot be denied. In fact, "there's a reason why the first scene in every military putsch is the tanks rolling up to the radio and television stations."[66] The speech theories advanced in this article have been called "democratic," based on the notion that communication of information and opinion is essential to democracy, to the building of public opinion which expresses itself (*inter alia*) in elections.[67] Once

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Constitution foresees")).

61. 74 BVerfGE 297, 335 (1987) (*"politische Willensbildung"*). Broadcasting has been the primary focus of the Constitutional Court's jurisprudence. *See Constitutionalizing Communications, supra* note 1, at 113-21 But in the real world this one-to-many medium has been largely supplanted by the many-to-many medium of the Internet. The Constitutional Court has not yet grappled with the collision of speech interests on the Internet, and it will be interesting to see whether the Court retains the continuity of its fifty-year development of communications, information and broadcasting freedom in this new context. *Compare* note 198, *infra,* and accompanying text.

62. *See, e.g.,* Post, *supra* note 20, at 1137 ("the Enlightenment framework that has so far governed our appreciation of democratic legitimacy").

63. *See generally* JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005)

64. Associated Press v. United States, 326 U.S. 1, 20 (1945).

65. Citizens United v. FEC, 130 S. Ct. 876, 890 (2010).

66. August 2008 interview with Prof. Wolfgang Schulz, Director of Hans Bredow Institute, Hamburg, Germany.

67. SUNSTEIN, *supra* note 3, at 77, 241, *passim* (German broadcasting jurisprudence as comparative example) (deliberative democracy). The German Court posits a basic principle of free opinion-building (*Grundprinzip der freien Meinungsbildung*). 74 BVerfGE 297, 335 (1987). This is a necessary condition of public consensus or "will-building." *Id.; see also* 73 BVerfGE 118, 157-58 (1986) ("broadcasting's role for opinion and political will-building"); *see also Constitutionalizing Communications, supra* note 1,

situated in the process of democratic opinion building, communications becomes unavoidably constitutional, and part of the legitimization of a democratic state.[68]

When the question is asked, people tend to agree that First Amendment interests are at least "implicated" in cases concerning communications facilities.[69] But specifically identifying those interests is a more difficult task. Difficulty is not an acceptable excuse for inaction, however, given that the specifics of our cognitive or information infrastructure are up for grabs, and being negotiated on a daily basis inside the Beltway. *Ad hoc* regulatory solutions will inevitably be a day late and a dollar short in an accelerating technological world governed by Moore's law,[70] and celebrated at a conference that proudly calls itself "DISRUPT."[71] Dispute resolution by private contract or property law will by definition tend to discount the constitutional interests in speech, discourse, and opinion-building when the First Amendment is absent or given a one-sided reading. A strong constitutional principle would provide a framework for the more granular decisions that are made every day regarding the technologically intensive electronic networks of today. This article argues that judicial development of a more completely theorized First Amendment is a better and more realistic approach to this problem than a legislative fix or a constitutional amendment.[72]

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at 125-30.

68. Jürgen Habermas, *Habermas Responds to His Critics (Reply to Symposium Participants, Benjamin N. Cardozo School of Law)*, 17 CARDOZO L. REV. 1477, 1481 (1996).

69. *See* discussion of City of Los Angeles v. Preferred Comm'ns and related cases, *supra* note 58.

70. MARKOFF, *supra* note 7, at xi ("The 'law' said the number of transistors would double every couple of years. It dictated that nothing stays the same for more than a moment; no technology is safe from its successor; costs fall and computing power increases not at a constant rate but exponentially").

71. Temple, Evangelista, *Mayor Declares Innovation Month in S.F.*, S.F. CHRON., September 11, 2012 (report on TechCrunch Disrupt conference), *available at* http://www.sfgate.com/default/article/Mayor-declares-Innovation-Month-in-S-F-3857562.php.

72. *See generally,* Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemna in State Constitutional Reform*, 68 TEMPLE L. REV. 1291, 1304 (1995) ("Citizens may fear that constitutional conventions would open up a 'Pandora's box'" and noting, on a federal level, "William Brennan, then Associate Justice of the United States Supreme Court, declared it 'the most awful thing in the world'") (citing RUSSEL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP viii (1982). Because of this widespread fear of opening the Pandora's Box of a

C. Setting the Stage: the Speech Interests at Issue (a Battle Between Two - or More - Concepts of Liberty)[73]

To contend, as Ronald Dworkin does, that people have an intrinsic moral right to say what they wish because it is an "essential and 'constitutive' feature of a just political society that government treat all its adult members . . . as responsible moral agents,"[74] or - as Professor Edwin Baker does - that "communicative action is [a constitutive] part . . . of our present, historical nature as persons," is only part of the story.[75]

The act of speaking is social; a purely individualized speech protection does not capture the whole picture, as Baker himself realized. Even the phrase "communicative action" suggests "a process by which people seek agreement," a "public discourse" in other words.[76] Contemporary First Amendment interpretation (or hermeneutics, as the theorists like to say) oscillates between these two poles, of private autonomy and public purpose, expression of individual liberty (self-fulfillment) and instrument of self-government.[77]

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constitutional convention, and a wariness about legislative solutions, the only practical avenue forward may be for the Supreme Court to take a more proactive and constitutional stance on information and communications issues. *Cf.* Crawford, *supra* note 28, at 261 (fearing a "mosh pit of stakeholders" if the long overdue rewrite of the Telecommunications Act of 1996 comes to pass).

73. The reference is to Isaiah Berlin's essay, *Two Concepts of Liberty, in* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118, *passim* (1969).

74. RONALD DWORKIN, FREEDOM'S LAW 7, 199-200 (1996), *cited in* Christopher Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 344-45 (2003). The moral argumentation here begs the question of whether corporations can in any sense be called "responsible moral agents." *See* Citizens United v FEC, 130 S. Ct. 876, 935 (2010) (corporation as First Amendment speaker).

75. C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491, 514 (1989), *as quoted in* Frank Michelman, *In Memoriam: "The Full Person as Reason-Giver": the Liberal Constitutional Conception of C. Edwin Baker*, 12 U. PA. J. CONST. L. 949, 950 (2010) (alterations in original).

76. *Cf.* Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 267 (2011) ("premise of discourse, that is, of communicative action, a process by which people seek agreement").

77. Earlier analyses had spoken of additional First Amendment purposes of "truth finding" and societal "steam valve." My research for a 1983 student law review note led me to conclude that there were historically "four separate but interrelated theories of free speech" that animated First Amendment interpretation: (1) individual self-fulfillment; (2) discovery of truth (citing Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616, 630 (1919) that the "test of truth is the power of the thought to get itself accepted in the competition of the

This dichotomy is sometimes described as the clash "between a libertarian and a democratic theory of speech."[78] Or between a "procedural" and a "substantive" view of the First Amendment.[79] The German Constitutional Court posits an antinomy between subjective individual rights and "objective" constitutional norms that frame the democratic project (and may regulate institutional rather than individual behavior).[80] The German philosopher Jürgen Habermas distinguishes between private and public autonomy (although the two have an interior relationship to one another).[81] Then Professor and now Supreme Court Justice Elena Kagan contrasts a "speaker-based" model, where the emphasis is on the "expressive opportunities [of] would-be communicators," with an "audience-based" model focused on the "quality of the expressive arena."[82]

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market"); (3) free speech as predicate of self-government (citing Alexander MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT (1948); and (4) "free speech as a steam valve" capable of exuding "excess societal pressure" and thereby "preserv[ing] the balance between stability and change" (citing Thomas Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 428 (1980); *see West German Television Law*, *supra* note 1, at 197.

78. OWEN FISS, THE IRONY OF FREE SPEECH 3 (1996).

79. *See, e.g.*, Kathleen M. Sullivan, *Discrimination, Distribution, and Free Speech*, 37 ARIZ. L. REV. 439, 448-49 (1995):

> Some thoughtful critics of free speech law, in contrast, take a substantive rather than a procedural view. The First Amendment should be read, they say, not only to free speakers from government discrimination, or protect them from the sin of thought control.

These "thoughtful critics" argue that the goal should be "maximizing speech maximizing the diversity of what is said":

> Professor Sunstein, for example, has argued that the First Amendment should be read to promote deliberative democracy. Thus, in his view, the free speech end-state "must reflect broad and deep attention to public issues" and "there must be public exposure to an appropriate diversity of view." In other words, not just discrimination but distribution matters: in his words, "It is important to ensure that government does not suppress dissident views. It is also important to ensure not merely that diversity is available, but also that a significant part of the citizenry is actually exposed to diverse views about public issues."

Id., citing SUNSTEIN, *supra* note 3, at 20-23.

80. *Constitutionalizing Communications*, *supra* note 1, at 130.

81. Habermas, *supra* note 68, at 940 ("Thus private and public autonomy mutually presuppose each other in such a way that neither human rights nor popular sovereignty can claim primacy over its counterpart").

82. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424 (1996) (rejecting both of these approaches in favor of a third approach most concerned with governmental

Marvin Ammori, in a recent law review article, and Dawn Nunziato in her 2009 book *Virtual Freedom,* provide useful surveys of these opposing viewpoints in First Amendment scholarship, and do so under the rubric of "negative" and "affirmative" models or conceptions of First Amendment protection.[83] Ammori, drawing on the British philosopher Isaiah Berlin, distinguishes between "negative liberty - a freedom from government involvement in speech," and "an exceptional affirmative model or equality model."[84]

As his parade example of a negative liberty conception, Ammori quotes the venerable Professor Laurence Tribe's brief against net neutrality regulations, where Tribe argues that "a central purpose of the First Amendment" is "to prevent the government from making just such choices about private speech."[85] Ammori identifies four corollaries of the negative liberty conception: a principle of "government distrust" (what has been called the "slippery slope" problem); a belief that judges should impose a broad value-neutrality on government (should "not pick winners and losers"); which leads to the third corollary, government should not "redistribute" speech opportunities; and, finally, the assumption that private speech is tied to property rights.[86]

Ammori finds two "fallacies" underlying this complex of corollaries: An "is-ought" fallacy, namely that law ought to be what

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motive).

83. Dawn Nunziato, VIRTUAL FREEDOM NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE (2009).

84. Ammori, *supra* note 21, at 1, 4 n.4 (citing at n.4 Isaiah Berlin, *Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY 118 (1969).

85. Amori, *supra* note 21, at 7-8 n.21-22 and accompanying text (quoting Laurence H. Tribe & Thomas C. Goldstein, *Proposed "Net Neutrality" Mandates Could Be Counterproductive and Violate the First Amendment,* at 2-4, *written and submitted as* Exhibit A to Comments of Time Warner Cable, Inc., FCC GN Docket No. 09-191, Oct. 19, 2009, *available at* http://freestatefoundation.org/images/TWC_Net_Neutrality_Violates_ the_First_Amendment_-Tribe_Goldstein.pdf.

86. Amori, *supra* note 21, at 14 n.47 (citing Geoffrey Stone, *Autonomy and Distrust,* 64 U. COLO. L REV. 1171 (1993); *see also* description of "slippery slope" in Sunstein, *Speech in the Welfare State; Free Speech Now,* 59 U. CHI. L. REV. 255, 259-60 (1992) ("idea is that any restrictions on speech, once permitted, have a sinister and inevitable tendency to expand. Principled limits on government are hard to articulate; to allow one kind of restriction is in practice to allow many other kinds as well. 'Slippery slope' arguments therefore deserve a prominent place in any theory of free expression, as do the equally problematic and thorny issues around 'balancing' of competing speech rights (which, as noted elsewhere herein inevitably arises when talking about speech on a network").

it has traditionally been; and an inductive fallacy stemming from the aggregate of constitutional law being distilled from a "small, selective sample . . . [of] offensive-speech cases," which then become "core principles" as in the corollaries set out above. For example, arguments against rules providing access to cable systems and shopping malls are said to violate the "core" principle of government distrust: "Equanimity in the face of the government insertion of its regulatory power into the marketplace of private expression is grossly inconsistent with the venerable tradition of healthy skepticism of the governmental regulation of expression."[87]

So Ammori goes looking for precedent beyond the too-small set of paradigmatic offensive speech cases. He finds a number of instances where government has acted affirmatively to create speech opportunities: traditional public fora like public streets and parks; limited public fora; public fora on private property (company towns, shopping centers); public fora created by telegraph and telephone common carriage and the universal service funds to extend telephony to those otherwise unable to afford it; the effective public forum created by the Post Office; and leased and public-educational-governmental (PEG) access rules for cable television. In each instance, Ammori sees a "space" where public speech can occur. In each instance, government has acted in a content-neutral way to create a prerequisite of public speech or (as Habermas would have it) of public autonomy. In the case of traditional public fora on public land, government must allow free speech; government authority in the other areas is permissive.

Against arguments that such a legislative approach would be permissible (if not mandated) under the First Amendment in other communications contexts, two further objections are made: (1) warnings about possible unintended consequence should the Supreme Court depart from the alleged normative consensus around negative freedom as *leitmotif* of the First Amendment; and (2) concern that the costs and burdens of a positive speech environment would fall most heavily on the shoulders of private property, namely that of the network owners.[88] No matter that the

87. Amori, *supra* note 21, at 19 n.74 (citing Martin Redish & Kirk Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U.L. REV. 1083, 1086-87 (1999)).

88. *See, e.g.*, comments of Lillian BeVier at Feb. 16, 2012, *Stanford Technology Law Review* Symposium: First Amendment Challenges in the Digital Age, panel on Prof. Ammori's paper *First Amendment Architecture*, *supra* note 21. The Entirety of the

communication networks that carry broadband services today were largely built by the telephone companies with ratepayer money, in a tightly regulated environment that protected the network owners and users alike. No matter that both telephone and cable operators are reliant on the continued use of public streets easements, utility poles owned by other utilities, and - in the case of wireless broadband - allocations of radio-frequency spectrum from the airwaves that were earlier said to "belong to the people."[89]

Enter the Germans with an attempt to get beyond the dichotomy of private and public speech rights, with the notion of speech as a *process*. The German Court's decisions and German speech theory suggest a model which incorporates much of what Ammori says, but cuts - in my view - closer to the bone of the First Amendment. This is the model of rational speech, speech embedded in informed discourse between a speaker and a listener, deliberative, problem-solving. This is speech in the political sense, speech that is designed to convince, and build consensus. It is "communicative action." Although this has been called the "discourse model" of free speech, it does not always occur on a podium or dais; it can come in the form of a cartoon, a musical, a blog or interactive website, or any other "meme" or platform that transfers information and is part of a public conversation.[90]

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symposium is available at http://www.youtube.com/watch?v=E6sQSSc-B8M.

89. President Johnson, in comparing the Public Broadcasting Act to the 1862 Morrill Act, 12 Stat. 503 (1862) *codified at* 7 U.S.C. §301-08 (1988), which set aside lands in every state to build land grant colleges, stated: "So today we rededicate a part of the airwaves - which belong to all the people - and we dedicate them for the enlightenment of all the people," *as quoted in* Steven Zansberg, *Objectivity and Balance in Public Broadcasting: Unwise, Unworkable, and Unconstitutional,* 12 YALE L. & POLICY REV. 184 194 n.60 (1994) (quoting Weekly Comp. Pres. Doc. 1531 (Nov. 13, 1967)); *compare* Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age,* 15 COMMLAW CONSPECTUS 431, 440-42 (2007); *see also* Amori, *supra* note 21, at 51-53 (describing communications carriers' use of public and third-party resources); and 37-44 (describing the public fora discussed in previous paragraph).

90. See discussion in Part IV.A *infra*. *See also* Boyle, *supra* note 50, at 183 (celebrating the cyber-libertarian ethos):

> It is the mixture of Enlightenment values and upbeat, public-goods theory that typifies Internet analysis of information flows. Information is costless to copy, should be spread widely, and cannot be confined. Beyond the Jeffersonian credo lies a kind of Darwinian anthropomorphism. Information really does want to be free. John Perry Barlow credited Brand's phrase ["information wants to be free"] with "recognizing both the natural desire of secrets to be told and the fact that they might be capable of possessing something like a 'desire' in the first place." Barlow

In what is commonly referred to as the *Magna Carta* of German broadcasting speech jurisprudence, the 1961 case in which the Constitutional Court rejected Konrad Adenauer's attempt to form a national, government-owned broadcast network, the Court embarked on the road to its "neither state nor private" formula for broadcasting.[91] This was one year before a young German professor named Jürgen Habermas published his groundbreaking empirical analysis of the democratic process in action, *The Structural Transformation of the Public Sphere.*[92] Since then, the Constitutional Court's development of a constitutional norm of communications freedom and Habermas' philosophical project to develop a "theory of communicative action" have run roughly parallel (but by no means always consistent) courses. The end point for both has been the public sphere, the *Öffentlichkeit.* The Constitutional Court repeatedly situates the individual or subjective right of free speech in the public square, and describes the reciprocal relationship between private and public opinion-building, as more fully described below.

D. The Problem of Constitutional Comparisons

It is the contention of this article that foreign constitutional and media law can amplify, extend, deepen, and throw into new light the United States debate about First Amendment values. This contention raises the threshold question of whether it is permissible or advisable for U.S. courts in ruling on domestic communications issues to consider foreign law, constitutions, or legal theories, or to consider the experience of other countries with different

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continued: English biologist and philosopher Richard Dawkins proposed the idea of "memes," self-replicating, patterns of information which propagate themselves across the ecologies of mind, saying they were like life forms.

I believe they are life forms in every respect but a basis in the carbon atom. They self-reproduce, they interact with their surroundings and adapt to them, they mutate, they persist. Like any other form they evolve to fill the possibility spaces of their local environments, which are, in this case the surrounding belief systems and cultures of their hosts, namely, us.

Id. (quoting John P. Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net, available at* https://homes.eff.org/~barlow/EconomyOfIdeas.html).

91. 12 BVerfGE 205, 263 (1961); 31 BverfGE 314, 325 (1972); *see also Constitutionalizing Communications* at 115.

92. JÜRGEN HABERMAS, STRUKTURWANDEL DER ÖFFENTLICHKEIT (Hermann Luchterhand Verlag, 1962), *published in English as* THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (1989).

communications architectures. Are the constitutional values of Germany and other countries off-limits for any domestic legal or policy debate?

The use of comparative and transnational law in Supreme Court (and lower court) jurisprudence is not unknown, but some U.S. jurists famously resist citation to foreign precedent. Justice Rehnquist extolled the benefits of such a comparative legal approach,[93] while Justice Scalia worried about the "brave new meaning" the Constitution might be given through such a comparative approach.[94] The consensus view in the scholarly

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93. William Rehnquist, *Verfassunggerichte – vergleichende Bemerkungen,"* in DEUTSCHLAND UND SEIN GRUNDGESETZ 454 (KIRCHHOF, KOMMERS, EDS .) (Nomos Verlag, 1993), ("[i]t is time that United States courts begin looking to the decisions of other constitutional courts to aid them in their own deliberative process"), *quoted in* Kommers, *Can German Constitutionalism Serves as a Model for the United States*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 787 (1998); *see also* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1280 n.262, *passim* (1999).

94. Roper v. Simmons, 543 U.S. 551, 627, n.9 (2005) (Scalia, J., dissenting, rejecting majority's finding, partially in light of foreign precedent, that the juvenile death penalty was no longer acceptable under the Process and Equal Protection Clauses of the Constitution):

> The Court responds that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Ante,* at 578. To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice [of allowing juries to find death penalty appropriate for minors]. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.

Id. at 628. The majority's reliance on foreign law to repudiate the juvenile death penalty unleashed a virulent reaction and calls for the impeachment of Justice Kennedy, who had written the majority opinion. JEFFREY TOOBIN, THE NINE 194-99 (2007) (the decision "tapped into a deep nativism"); Toobin, *Swing Shift, How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, Sept. 12, 2007 NEW YORKER ("debate over foreign law and the Constitution thrusts the Supreme Court into the perennial struggle in American politics between internationalists and isolationists"); *compare* German approach in, for example, 7 BVerfGE 198, 208 (1958) (*Lüth* decision) (quoting from Palko v. Connecticut 302 U.S. 319, 326-27 (1937) (Cardozo, J.)).

literature seems to be that "the persuasive value of [such] a . . . source will depend on a combination of its reasoning, the comparability of its contexts, and its institutional origin."[95]

German constitutional experience, some argue, is relevant to interpreting the U.S. Constitution under these criteria because both countries share democratic values, a market economy, and because of an intertwined history:

> [T]he constitutional systems [in German and Italy] were our "constitutional offspring," . . . they "unmistakably drew their origin and inspiration from American constitutional theory and practice." Reciprocating was appropriate because "wise parents do not hesitate to learn from their children."[96]

As discussed above, the German Constitutional Court took what was essentially an emergency, provisional and temporary constitution, shaped under the Allies' watchful eyes, and made it its own. The Court has repeatedly elaborated on the meaning of the Article 5 communication guarantees in the Basic Law, and has prodded the legislature (at least in the case of broadcasting) to adopt an instrumentarium adequate to protecting a diverse and information-rich public discourse.

Where the German Article 5 (in addition to securing the freedom *from* government censorship) requires the legislature to craft a system that insures sufficient information for public opinion-building, the First Amendment as interpreted by the Supreme Court is more often treated as a limit to what legislatures can do to promote an adequately informed populace.[97]

How did this difference arise, and how much does it matter going forward, when it can be said that Germany's constitution is in many respects more similar than dissimilar to the United States' constitution? Most constitutional taxonomies look first at whether a constitution is written or oral, located in one document or several,

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95. Vicki C. Jackson, *Constitutional Law and Transnational Comparisons, the Youngstown Decision and American Exceptionalism*, 30 HARV. J.L. & PUB. POL'Y 191, 206 (2006) (quoting her earlier work, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 199 HARV. L. REV. 109, 125 (2005)).

96. Tushnet, *supra* note 93, at 1226 (quoting United States v. Then, 56 F.3d 464, 468-69 (2d. Cir., 1995) (Calabresi, J., concurring).

97. One need here only adduce the negative First Amendment arguments made against the Fairness Doctrine, "must carry" rules, and campaign finance legislation. The further use of the First Amendment as a sword against social and consumer protection legislation is discussed in Part V.C *infra*.

provides for easy amendment or not, and allows (or requires) constitutional review of executive and legislative acts or not.[98] In each of these areas, the similarity between the U.S. and German constitutions outweighs their differences.

The difference between the two different constitutional approaches to speech may be due to the textual differences described above, or to a culture with a longer history of examining issues at the nexus of law, speech and culture. Or it may come from the distinction between a "procedural" constitution like our own, the principal purpose of which is to define and limit the power of the state, and a constitution like Germany's which incorporates substantive values and requires government action to implement those values.[99] At the risk of over-simplifying the matter,[100] we can cite at least two distinctions between the German Basic Law and the U.S. Constitution: (1) the Basic Law specifically incorporates substantive values, some of which (like human dignity and the "democratic and social" nature of the German state) may not be changed by amendment;[101] and (2) the Basic Law has been interpreted in many instances to require government action to incorporate those values.[102] With regard to communications freedom, the requirement of affirmative governmental action is supported by the text, as the Basic Law refers to a "guarantee" of

98. England is the primary example of a country without a unified written constitution (although it does have documents such as the English *Magna Carta* that spell out the values under which English society is constituted). Other examples are Israel and New Zealand. *See, e.g.*, MARK TUSHNET & VICKI JACKSON, COMPARATIVE CONSTITUTIONAL LAW 199 (1999) (Britain, Israel, and New Zealand provide plausible examples of democratic governments functioning without a single document commonly designated as a constitution).

99. *See* Sullivan, *supra* note 79 (contrasting "procedural" and "substantive" approaches to free speech); *compare* Habermas' "proceduralist understanding of law" based on substantive values, the "procedural conditions of the democratic process," *infra* note 157 and accompanying text.

100. Constitutional theory, including comparative constitutionalism, has been called "a large and vast discipline, [including] many different but importantly interrelated subjects." BEAU BRESLIN, THE COMMUNITARIAN CONSTITUTION xii (2004).

101. Basic Law, Section 79(3) forbids "[a]ny change to this Basic Law, through which . . . the rights secured by Articles 1 and 20 . . . are affected" (*Eine Änderung dieses Grundgesetzes, durch welche . . . die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig*"). Article 1 recognizes the inviolability of human dignity and human rights; Article 20 defines Germany as, among other thihgs, a "democratic and social federal state."

102. *See* discussion in Part IV.B *infra*; *see also infra* note 103.

free speech in the press, broadcast, and film contexts.[103]

The Constitutional Court has also adopted heuristic mechanisms that extend the reach of the explicitly stated communications freedoms. Private relationships can be affected by these fundamental constitutional values. This is the so-called *Drittwirkung* or radiating effect of constitutional rights, and is somewhat analogous to the way the Supreme Court has read First Amendment concerns into private libel actions in *New York Times v. Sullivan,* or the Equal Protection clause into private property relationships in *Shelly v. Kramer.* The Germans are able to do this, however, without the intervening judicial construct of "state action" (as discussed in Part IV.C *infra*).

Although U.S. and German constitutionalism are undeniably different, there are points of familial relationship even where the Constitutional Court is considering questions not yet broached by the Supreme Court, or building on the works of Kant, Hegel and other 19th century *Rechtsphilosophen* (legal philosophers).[104] In finding an objective right or value inherent in free speech, for instance, the Constitutional Court quotes Justice Cardozo:

> The basic right of freedom of opinion is the most immediate expression of the human personality in society and, as such, one of the noblest of human rights . . . . It is absolutely basic to a liberal-democratic constitutional order because it alone makes possible the constant intellectual exchange and contest among opinions that form the lifeblood of such an order; [indeed] *it is "the matrix, the indispensable condition of nearly every other form of freedom."*[105]

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103. The text of the Basic Law also supports the role of government in protecting other constitutional rights. The equal rights article (Article 3(1)) specifies that "the State *shall* promote the actual implementation of equal rights for women and men and the elimination of existing disadvantages" (emphasis added). Similarly, the article on protection of family and marriage (Article 6(1) states that "Marriage and family shall enjoy the special protection of the state.")

104. *See* KOMMERS, *supra* note 4, at 41 ("if American constitutional jurisprudence locates its indigenous spiritual roots in the commonsense realism of Madison, Hamilton, and Wilson, German constitutional jurisprudence finds its guiding light in the idealistic rationalism of Hegel, Kant, and Fichte [but] [t]he Basic Law represents a major break from this tradition. It does not regard the state as the source of fundamental rights. The core of individual freedom, like human dignity itself, is anterior to the state").

105. 7 BVerfGE 198, 208 (1958) (*Lüth*) (quoting (in English) Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (emphasis added) (German-English translation from KOMMERS, *supra* note 4, at 364-65).

Finally, German constitutional and communications scholars have devoted considerable effort to understanding the U.S. media landscape. Early in his career, and long before he became a Justice on the Constitutional Court, Professor Wolfgang Hoffmann-Riem spent a year in California writing a detailed critique of U.S. broadcasting.[106] Significant parts of Jürgen Habermas' *Between Facts and Norms* address U.S. constitutional law, and at other points he evokes a sort of dialogue between the two constitutional traditions.[107]

These common touchpoints could justify the consideration of German communications jurisprudence in U.S. speech cases.

III. Defining Information Freedom

I have picked the term "information freedom" to act as a standard-bearer for a complex of ideas that includes speech and communications freedom, freedom of reception, free information flow, "institutional" freedom of the press, and freedom of broadcasting - in sum, for a democratic and discourse-theoretical approach to speech. In so doing, my hope is that the phrase "information freedom" will flip the First Amendment gaze from speaker to listener, from the individual's e*xpression* to a process which includes both expression and reception.

At the outset, let me bracket out of this discussion several uses of the phrase that are not my focus here. First, is information in the

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106. WOLFGANG HOFFMANN-RIEM, KOMMERZIELLES FERNSEHEN [COMMERCIAL TELEVISION] (Nomos, 1981). Before his appointment to the Constitutional Court in 1999, Hoffmann-Riem returned to California to teach a media law course at Hastings College of the Law. As Prof. Kommers has noted:

> Many German justices have a close familiarity with American constitutional law. Indeed, a full set of the United States Supreme Court Reports is available in the library of the [then] West German Federal Constitutional Court. Perhaps one day this manifest interest in our constitutional jurisprudence will be reciprocated by U.S. Supreme Court Justices . . . .
>
> [I]n some areas . . German and American constitutional principles and theories could be blended fruitfully and seasonably to produce more equitable balances between rights and duties within the American political order.

Donald Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. OF PRACTICE & PROCEDURE 685 (1976) *quoted in* JACKSON & TUSHNET *supra* note 98, at 149.

107. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 267-81 (William Rehg trans., 1996) (containing an extended discussion of U.S. constitutional law).

hands of government - the subject of Freedom of Information Acts (FOIA) here, in the U.K., and throughout the world. Secondly, are privacy issues, which often are framed in terms of informational autonomy or control over personal information. While these concepts are certainly related to the information freedom I mean, indeed FOIA can be considered a subset of it, they do not precisely track what I am getting at here - the rights of information consumers, including the right to select information.

As used in this paper then, "information freedom" is an amalgam of concepts, drawn mainly from the German Constitutional Court, but also from international treaties, U.S. policy statements, the writings of constitutional law scholars, and what I call an "underground" current or rhizome strain of U.S. Supreme Court thinking that surfaces, sometimes out of context, in the Supreme Court's speech decisions.

A. Information Freedom in German Constitutional Law

Information freedom is described in the Basic Law as the right "freely to inform [one's] self from generally accessible sources." Its content has been most fully worked out in German constitutional cases involving broadcasting freedom (*Rundfunkfreiheit),* and in press cases where information freedom (*Informationsfreiheit*) stands more on its own.

In the Third (or *FRAG)* Broadcasting Decision,[108] the Constitutional Court stated that "[f]reedom of broadcasting serves the same purpose as do all of the guarantees of Article 5: free individual and public opinion building."[109] This opinion building, or *Meinungsbildung,* cannot occur in the absence of freedom of information, "the freedom to hear the expressed opinion of others, [and] to inform one's self."[110]

The Constitutional Court has made clear that, at least in

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108. *See generally Constitutionalizing Communications, supra* note 1, at 168-88.

109. 57 BVerfGE 295, 319, 321 (1982) (identifying broadcasting freedom as the point where "different constitutional rights positions meet, and may even collide," and observing that "[t]o the legislator belongs the duty of mediating such collisions").

110. *Id.* at 320-21; *see also* Fifth Decision, 74 BVerfGE 297, 323 (1987); Sixth Decision, 83 BVerfGE 238, 295-96 (1991) (using almost identical language); Ninth Decision, 114 BVerfGE 371, 387 (2005) (same); *see also Constitutionalizing Communications, supra* note 1, at 117-21 for an overview of the ten or so (depending on how they are counted) broadcasting Decisions of the Constitutional Court.

broadcasting, the Legislature has a duty to protect the information transfer process:

> The securing of free informational activities and free information access constitute an important concern of the Basic Law. . . There is thus a public welfare aspect to the prevention of information monopolies and the securing of a plurality of viewpoints and offerings . . . . [Free individual and public opinion-building] can only occur under the conditions of comprehensive and truthful information. Information contributes to education and to the testing of opinions. For that reason, Article 5, paragraph 1, sentence 2 of the Basic Law demands that the informational requirements of opinion-building be satisfied in this leading medium of broadcasting.[111]

As we will see, these words are not merely high theory; they have been applied in concrete cases to tip the scales in favor of a diversity of information, for example in the antitrust analysis applied to the merger application of Germany's largest publisher (Springer) with one of its largest broadcasters (Sat 1), as discussed below.[112]

In the infamous 1966 case of the *Spiegel Search Warrants*, involving the "institutional freedom" of the press,[113] the Constitutional Court posited information freedom as an essential part of a democratic constitution in a context other than broadcasting: "If a citizen is to make a political decision, he must be comprehensively informed, and also know and be able to weigh the opinions that others have developed."[114]

In 1969, the Constitutional Court expanded on the concept of information freedom in the context of deciding whether West German officials could censor or restrict access to East German newspapers. In the *Leipzig Newspaper* Decision, the Constitutional Court found government attempts to interfere with the newspapers' distribution to be an unconstitutional infringement on information freedom:

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111. 97 BVerfGE 228, 256-57 (1998) ("Short Reporting" Decision).

112. *See* Parts IV.C and VI.B *infra*. The U.S. Supreme Court likewise has cited free speech values in Associated Press v. United States, 326 U.S. 1, 19-20 (1945), as discussed in Part V.A *infra*.

113. *See Constitutionalizing Communications*, *supra* note 1, at 130; *see also* comparison drawn in Part V.B *infra* between the German concept of "objective rights" and the Supreme Court's construction of "interests broader than those of the party seeking their vindication."

114. 20 BVerfGE 162, 174-75 (1966).

> Information freedom stands in the constitutional order as co-equal with freedom of opinion and freedom of the press. It is not merely a component part of the right freely to express and disseminate opinion . . . [but] also itself a prerequisite of the opinion building which precedes the expression of that opinion. *Only comprehensive information, fed by sufficiently broad sources, makes possible the free opinion building and expression of the individual as well as the community.*[115]

The Constitutional Court referred briefly, but powerfully, to information freedom's troubled history in Germany:

> This notion of information freedom first found expression after the Second World War in the constitutions of the individual German States [citations omitted], and then finally in the Basic Law. The recognition of such an independent constitutional guarantee was prompted by the National-Socialist practice of government limitations on access to information, state control over opinion, and prohibitions on the reception of foreign radio broadcasts and selected literary and artistic works.[116]

The Court noted that the United Nations' Universal Declaration of Human Rights of 1948 had also protected the ability to "obtain and receive reporting and ideas through any form of transmission and independent of borders," and that the European Convention on the Protection of Human Rights and Fundamental Freedoms had adopted a similar protection two years later.[117]

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115. 27 BVerfGE 71, 81 (1969) (emphasis added).

116. *Id.* at 80. The validation of this subjective right in *Leipzig Newspaper* took the form of an *injunction* against the government's interference with West German citizen access to the East German press, but it created it created in this instance no *positive duty* of the legislature to insure citizen access to that information. The Court's emphasis on "comprehensive" information (n.111 and accompanying text) as a prerequisite of democratic opinion-building has led to a discussion of the limits of this principle, and conversely whether the government might in certain circumstances have a positive duty to protect the public's basic information supply ("*informationelle Grundversorgung*"). MICHAEL KLOEPFER, INFORMATIONSRECHT §3 ¶¶ 1-13, 64 (2002).

117. 27 BVerfGE at 82 (citing Universal Declaration of Human Rights art. 19, (10 Dec. 1948) U.N.G.A. Res. 217 A (III) (1948); European Convention on the Protection of Human Rights and Fundamental Freedoms art. 10(1)(Rome, 4 Nov. 1950), 312 E.T.S. 5, *as amended by* Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 Sept. 1953 (Protocol No. 3 *on* 21 Sept. 1970, Protocol No. 5 *on* 20 Dec. 1971, Protocol No. 8 *on* 1 Jan. 1990, Protocol No. 11 *on* 11 Jan. 1998) [hereinafter ECHR].

B. Information Freedom in International Treaties and Law

International treaties also reflect the slow maturation of the idea of information freedom, sometimes against formidable opposition. The end of World War II was an anchor point not just for Germany constitutional law, but also for the Universal Declaration of Human Rights, which the United Nations General Assembly adopted on December 10, 1948, in Paris, France. The Universal Declaration includes Article 19, specifically relating to the freedom of speech and information:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[118]

Among its champions was Eleanor Roosevelt. It was not, however, binding in any way on the U.N. member states. Nonetheless, Article 19 has been a standard reference point in public discussion, and more recently has served as the inspiration for several web-based information freedom campaigns.[119]

The continuing traction of information freedom on the international stage was affirmed by the General Assembly's adoption of the International Covenant on Civil and Political Rights in 1966 (effective 1976), which included an Article 19.2 that closely echoed Article 19 of the Universal Declaration, this time in what is considered by some (at least) to be a binding, international treaty.[120]

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118. Full text available at http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng; for a history of the Universal Declaration of Human Rights, *see also* http://www.un.org/en/documents/udhr/history.shtml; *see also* LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN, A FREE PRESS FOR A NEW CENTURY 119, 137-40 n.40 (2010) (quoting Report of the Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. E/CN.4/1998/40 Jan. 28, 1998, ¶14 (arguing that "right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems")).

119. *See, e.g.*, www.article19.org, and www.freespeechdebate.com.

120. *See* Philip L. Verveer, State Dept. Coordinator for International Communications and Information Policy, *Two Cases for Internet Freedom*, Remarks at Winnik Telecom and Internet Forum (May 12, 2012), *available at* http://www.state.gov/e/eb/rls/rm/2012/190144.htm. Article 19.2 states:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally or in print, in the form of art, or through any other media of his choice.

At the European level, battles have been fought to enshrine information freedom as a fully binding principle of European law. The European Union in its various manifestations has been a primarily mercantile enterprise; whether through the principle of subsidiarity or otherwise, democratic values are seen as primarily the concern of the member states and their constitutions.[121] The protection of free speech, communication, information, and broadcasting on a federal or European level have been left largely to two human rights treaties - the 1950 European Convention on Human Rights and the more recent European Charter of Fundamental Rights - neither of these treaties had full status in European Union lawmaking until the Treaty of Lisbon adopted the Charter in December, 2009,[122] although the Convention had been considered among the "primary" sources of European law.[123]

In Article 10 of the European Convention, the European Council guaranteed freedom of expression and the freedom to receive information in words almost identical to Article 19.[124] The

121. *See* European Court of Justice Opinion 2/94, ¶ 27 (1996) (holding that the European Community Treaty, adopted in Maastricht in 1992, did not authorize the European Community to enact rules on human rights or otherwise adopt the ECHR which had been promulgated 42 years earlier); *see also id.* ¶ 33 (The European Court of Justice "draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights [and] has stated that the Convention has special significance," even if not formally binding law) (citation omitted). This Opinion, and other shortcomings of the ECHR, led to the drafting of a successor document, the Charter of Fundamental Rights. The Opinion is available online, with summary of parties' arguments, *at* http://www.pravo.unizg.hr/_download/repository/ Opinion_2_1994.pdf.

122. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, declaration 17, Dec. 13, 2007, 2007 O.J. (C 306) 1, at art. 6(1) ("The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties"), *available at* http://eur-lex. europa. eu/LexUriServ /LexUriServ.do? uri=OJ:C:2007:306:FULL:EN:PDF.

123. The ECHR was viewed as a primary source of European law, although it had never been formally adopted by the European Union. DIETER DÖRR & ROLF SCHWARTMANN, MEDIENRECHT 135 (1st ed., C.F. Müller, 2006) (ECHR represents "unwritten EC fundamental rights").

124. ECHR, art. 10, ¶ 1 states as follows:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

codification of these values as "enforceable individual rights" was seen as a natural reaction to the "catastrophe of the second world war."[125]

Nor was it surprising, coming twelve years *before* the German Constitutional Court's first pronouncement on broadcasting freedom,[126] that Article 10 focuses on individual speech rights, and not on speech, the press, or broadcasting seen in an objective, institutional, or systemic light.[127] Supporters of the German Constitutional Court's broadcasting freedom jurisprudence viewed Article 10 as anchored primarily in a negative freedom model, rather than in the role broadcasting might play in society; they worried that Article 10 would lead to "a market oriented entrepreneurial freedom in the tradition of the press" rather than the "public service" idea developed by the German Constitutional Court and in other countries as well.[128]

These concerns played out fifty years later, when a council of

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125. Martin Stock, *EU-Medienfreiheit - Kommunikationsgrundrecht oder Unternehmerfreiheit, in* 2001 K&R 289, 290.

126. 12 BVerfGE 205 (1961) *discussed in West German Television Law, supra* note 1, at 151-60.

127. *See, e.g., Constitutionalizing Communications supra* note 1, at 130 ; *see also* Parts IV.B. and V.B, *infra.* Broadcasting was conceived of as a "public service" in both Germany and the U.K. *Cf.* Wolfgang Hoffmann-Riem, *Rundfunk als Public Service, Anmerkungen zur Vergangenheit, Gegenwart und Zukunft öffentlich-rechtlichen Rundfunks* [*Broadcasting as Public Service: Notes on the Past, Present, and Future of Public-Law Broadcasting*], 54 M&K 95, 96 (2006) (BBC's Hugh Carlton Greene as early inspiration for North German Broadcasting).

128. Stock, *supra* note 125, at 293. Their worries were not unfounded, as the European law has been used to challenge national public service broadcasting institutions, as discussed in *Constitutionalizing Communications, supra* note 1, at 186-88 and 195-96. *See also* Degenhart, *Medienrecht und Medienpolitik im 21 Jahrhundert,* 2000 K&R 49, 52-54 (arguing that Article 10 of the European Human Rights Convention anchors primarily a subjective right of broadcasting producers to engage in that activity, and that neither the European Convention nor the German Basic Law support a continuing objective "special order" for broadcasting institutions in an age of international networks, IP technologies, and convergence); *but see* Wolfgang Schulz, *Konzeptionelle Vorüberlegungen zu einer europäischen "Content without Frontiers Directive,"* 2003 K&R 577, 579 n.23-24 and accompanying text ("disputes continue as to [whether and] what extent this norm [Article 10 of the Convention] contains something like the legislative duty to *guarantee* [broadcasting freedom as derived from] the Basic Law. The decisionmaking of the European Court of Human Rights, however, does legitimize state regulation in service of guaranteeing broadcasting pluralism") (citations omitted, emphasis added); Dörr, *Möglichkeiten u Grenzen europäischer Medienpolitik: Konvergenz u Kompetenz,* 1999 K&R 102 ("Article 10 of the European Convention on Human Rights demands . . a total [broadcasting] offering that corresponds to the pluralism principle").

the European Union adopted a Charter of Fundamental Rights, which was to serve as a prototype for a European Constitution. Article 11 of the Charter provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The freedom and pluralism of the media shall be respected.[129]

Beneath these placid words, particularly those in the second paragraph, lay a prolonged struggle to add a social and democratic dimension to the Charter. The German contingent fought to add language recognizing the imperative of free and neutral speech carriers, not just individual free speech.[130] As late as the penultimate draft of the document, the second paragraph had read "The freedom and pluralism of the media are *guaranteed.*"[131] The spectre of an "objective law structural principle," capable of mandating unified European action to preserve freedom and pluralism of the media as the Constitutional Court had developed these concepts, was apparently too much for "potentially affected private enterprises" who immediately set to work convincing important German politicians to push for a less binding EU role. Private broadcasters joined with individual German States who were afraid they would be preempted by a new supranational European law; at the last moment, the verb "respected" was substituted for the verb "guaranteed," and the above language was approved.[132]

Although less democratic (in the sense of the German communications jurisprudence) than it might have been, at least one observer believes that the words "freedom and pluralism of the media" helped overcome the "market oriented solipsism" of the earlier Convention,[133] and gave recognition to something akin to

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129. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, O.J. (C 364) 1, art. 11 *available at* http://www.eucharter.org/home.php?page_id=18.

130. Stock, *supra* note 125, at 289, *passim.*

131. *Id.* at 300 (emphasis added).

132. *Id.* As reflected throughout this discussion, there is a tri-level federalism at play here, with the European Community, the German Federal Republic, and the individual German States (which have jurisdiction over cultural matters) all vying for primacy in broadcasting and communication issues. *See Constitutionalizing Communications, supra* note 1, at 193-96.

133. Stock, *supra* note 125, at 293.

communications freedom, the principle of independent broadcasting and other media institutions as a necessary function in a democratic society.[134]

Thus, while the European Community Treaty's free trade provisions act as the equivalent of a "dormant commerce clause" prohibiting member state legislation that might be construed to interfere with a common European market, the Treaty still lacks specific complementary authorization for a European-wide replacement for the broadcasting-specific regulation that may be preempted, i.e., "legislation for communications purposes, plurality and equal communications opportunities."[135]

C. Information Freedom in U.S. Policy Statements

In 2010, at the Newseum, the press industry's glittering monument to itself,[136] Secretary of State Hillary Clinton pronounced "The spread of information networks is forming a new nervous system for our planet."[137] She recalled how President Obama had "defended the right of people to freely access information" when he visited China. She spoke of "threats to the free flow of information," but located those threats primarily (if not exclusively) in foreign governments, reminding them that a "connection to global information networks is like an on-ramp to modernity." She used the phrase "information freedom," and concluded by stating the

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134. In 2006, the EC adopted a UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, which some believe could open the way to a more specifically communications-oriented bill of rights. The EC decision is memorialized at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1830&format=HTML&aged=1&language=EN&guiLanguage=fr; and the UNESCO Convention is found at http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html (Article 6(2)(h) provides that members may adopt "measures aimed at enhancing diversity of the media, including through public service broadcasting").

135. Schulz, *supra* note 128, at 579.

136. Some have argued that, while the Newseum presents a fascinating "cabinet of curiosities," it is really a "fetishizing of trivial relics" at the expense of serious issues in the distribution of news, including ownership concentration, Internet issues, cultural bias, and the like. *See* Jack Shafer, *Down with the Newseum and its 6,214 journalism artifacts!*, SLATE.COM (Feb. 7, 2008), http://www.slate.com/articles/news_and_politics/press_box/2008/02/down_with_the_newseum.html.; Rachel Gans, *The Newseum and Collective Memory: Narrowed Choices, Limited Voices, and Rhetoric of Freedom*, 26:4 JOURNAL OF COMMUNICATION INQUIRY 370-90 (October 2002).

137. January 21, 2010, Remarks of Secretary of State Hillary Clinton at the Newseum, *available at* http://www.state.gov/secretary/rm/2010/01/135519.htm.

U.S. position in apparently unequivocal terms:

> We stand for a single internet where all of humanity has equal access to knowledge and ideas. And we recognize that the world's information infrastructure will become what we and others make of it.[138]

In a 2012 speech and policy statement, State Department Coordinator for International Communications and Information Policy and former antitrust attorney, Philip Verveer, made the parallel legal case for "Internet Freedom grounded in human rights," quoting from Article 19. "The right 'to seek, receive and impart information and ideas through any media and regardless of frontiers' is the embodiment of the rights-based case for Internet Freedom, articulated some two decades before the concepts that, reduced to practice, became the Internet."[139] Left unclear is whether information freedom is understood by the State Department only as a "negative freedom"; the notion of private censorship or economic concentration in the information and communication businesses is almost entirely absent. Indeed, Verveer voices the hope that economic interests will drive Internet openness abroad, while leaving untouched the actions of those interests at home.

Finally, President Obama himself has repeatedly emphasized the importance of free information flow. When he visited China and met with Chinese students in 2009, he stated (in remarks censored by Chinese media) that "access to information" was a "universal right," and "that the more freely information flows, the stronger the society becomes."[140]

Unfortunately, the reality was (and remains) that U.S. law is itself not always hospitable to a freer information flow, as described

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138. *Id.* Secretary Clinton has addressed this issue on several subsequent occasions. *See, e.g.*, February 15, 2011 speech at George Washington University, *available at* http://www.state.gov/secretary/rm/2011/02/156619.htm ("Internet Rights and Wrongs: Choices and Challenges in a Networked World").

139. *See* Philip L. Verveer, State Dept. Coordinator for International Communications and Information Policy, *Two Cases for Internet Freedom,* remarks at Winnik Telecom and Internet Forum (May 12, 2012), *available at* http://www.state.gov/e/eb/rls/rm/2012/190144.htm; *see also* Philip L. Verveer, *Remarks at the Internet Governance, Internet Freedom, and Economics Conference on the Arab World after the Arab Spring, available at* http://www.state.gov/e/eb/rls/rm/2012/189500.htm.

140. President Barack Obama, remarks at Museum of Science and Technology, Shanghai, China (Nov. 16, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-town-hall-meeting-with-future-chinese-leaders.

below. While it is true that the Internet represents still, and for the most part, a single, global, interconnected and largely integrated network, and that "the world's information infrastructure will become what we make of it," there is no acknowledgement in any of these official pronouncements of problems with information freedom at home, or of threats to information freedom from the commercial sector, just happy talk about "principles like information freedom [that] aren't just good policy, not just somehow connected to our national values, but [that] are universal and . . . also good for business."[141] And, while there are hints of the constricting effects of private censorship, there is no readily apparent discussion of this topic on the State Department's webpage devoted to "Internet Freedom."[142]

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141. Clinton remarks, *supra* note 137. The State Department's Verveer, while hoping that economic interests will drive information freedom, at the same time finds it necessary to "urg[e] U.S. media companies to take a proactive role in challenging foreign governments' demands for censorship and surveillance." Nor is there any discussion of the elephant in the living room - the screening and deep packet inspection techniques sold by U.S. companies to repressive foreign governments, and deployed for financial and (they argue) operational reasons domestically, as described below. *See generally* REBECCA MACKINNON, THE CONSENT OF THE NETWORKED 53 (2012).

142. *See Internet Freedom*, U.S. DEP'T OF STATE, http://www.state.gov/e/ eb/cip /netfreedom/index.htm#work. The State Department has posted a 2009 report of Freedom House, *Freedom on the Net - A Global Assessment of Internet and Digital Media*, which does note the possibility of private censorship, albeit in a different context than discussed in this article:

> Privatization of censorship: There is a growing trend toward outsourcing censorship and monitoring to private companies, as opposed to direct intervention by government agencies. In a range of countries with differing levels of democracy, private entities and their employees — including service providers, blog-hosting companies, cybercafes, and mobile-phone operators — are being required by governments or other actors to censor and monitor information and communication technologies (ICTs). This has been the case for local and multinational enterprises alike.

Id. at 2, *available at* http://www.state.gov/documents/organization/135959.pdf. This description of censorship at the instigation of the state differs by definition from the self-interested and self-initiated censorship of broadband networks operators and ISPs, described in Part V.F *infra*.

Freedom House does, at least, ask many of the right questions:

> To what extent are sources of information that are robust and reflect a diversity of viewpoints readily available to citizens ... ?
>
> Does the public have ready access to media outlets or websites that express independent, balanced views?
>
> Does the public have ready access to sources of information that represent a range of political and social viewpoints, including those of vulnerable or marginalized groups in society?

D. Information Freedom in U.S. Law, Legal Thinking, Philosophy, and the Marketplace

While there are intimations, and occasionally bold statements, of information freedom in U.S. constitutional law, U.S. speech jurisprudence circa 2012 is still largely in thrall to an individual, speaker-centric, and "negative freedom" view of free speech. The concept of information freedom presented here is informed by the minority view in U.S. law, discussed in Parts V.A and B below, by legal thinkers like Cass Sunstein, pundits like James Surowiecki, by philosopher John Rawls, and by "digital natives" and legal advocates Larry Lessig, Tim Wu, Susan Crawford, Marvin Ammori, and (contrariwise) Christopher Yoo.[143]

I do not mean to suggest that the digital revolution has spawned only high-flown rhetoric and giddy optimism. To be sure, there is a dystopian side to the *de facto* information freedom wrought by Internet Protocol and exponentially expanding processing speeds and memory capacity. There is the problem of cyber-terrorism.[144] With regard to the Information Age's

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> To what extent are online communication or social-networking sites used as a means to organize politically, including for "real-life" activities?
> Are there economic constraints that negatively impact users' ability to publish content online . . . ?
> Is there a high degree of ownership concentration within the online services and advertising industry?
> Are users required to pay varying fees for different degrees of access and publication rights (i.e., are there limitations on "net neutrality")?
> Do users have access to free or low-cost blogging services, web hosts, etc. that allow them to make use of the internet to express their own views?

Id. at 16-17.

143. *See,* in place of many, Amit Schejter, Moran Yemini, *Justice, and Only Justice, You Shall Pursue: Network Neutrality, the First Amendment and John Rawls's Theory of Justice,* 14 MICH. TELECOMM. TECH. L. REV 137, 171 (2007). Although "digital native" is sometimes used to refer to a person "born during or after the general introduction of digital technologies and [who] through interacting with digital technology from an early age, has a greater understanding of its concepts," and thus would not strictly include some of the persons mentioned, it nevertheless conveys the sense of those who have grown up with the technology and forms a contrast to more abstract and academic European public policy experts. Definition of digital native *found at* Digital native, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Digital_native. *See also* Stefan Geens, *Europe Arrives? Berlin's Humboldt Institute for Internet and Society Launches* (Nov. 7, 2011) *available at* http://dliberation.org/2011/11/07/europe-arrives-berlins-humboldt-institute-for-internet-and-society-launches/

144. *See, e.g.,* Gina Abercrombie-Winstanley, Remarks to the Second Tri-Border Conference in Manilla, Philippines on Terrorist Use of the Internet (June 28, 2010),

implications for civil society, there are also problems and dissenting voices; sometimes the same writer can wax from optimistic to pessimistic from book to book, or in the space of a single book.[145]

The reality of commercial censorship, however, poses a limit - and I argue, the most significant limit - to the potential for information freedom created by the Internet. Everything, from newspapers to television (broadcast and cable), from the iPhone to mail, is converging onto one network, thanks to IP technology; the problem which animates this article is that ownership of that network is concentrated in increasingly fewer hands. There is the potential for information bottlenecks in every medium, and the current network is no exception; it just seems the stakes are higher.[146]

IV. Situating Information Freedom in German Law

Information Freedom is found in Article 5 of Germany's Basic Law, embedded among the other Article 5 freedoms of the press, broadcasting, and speech. It is part of a larger system of free expression, from which it draws jurisprudential muscle.

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available at http://www.state.gov/j/ct/rls/rm/2010/143876.htm. Ms. Abercrombie-Winstanley understands that there is a delicate balancing act here between free speech and safety:

> The Internet presents us with a paradox. On the one hand, it facilitates free discussion and the exchange of information. It also provides another venue for individuals to exercise their right to freedom of expression. But by the same mechanism, it allows people to seek each other out anonymously; to reinforce their negative views or plan violent action. The challenge for open societies, therefore, is to maintain the free flow of information and respect for freedom of expression, while discouraging those who would exploit it to harm others.

Id. How this balance is to be worked out, and whether or not the U.S. Government has balanced these issues correctly, is a large topic substantially beyond the scope of this article. *See also* Elisabeth Bumiller & Thom Shanker, *Panetta Warns of Dire Threat of Cyberattack*, N.Y. TIMES, Oct. 12, 2012, http://www.nytimes.com/ 2012/10 /12/world/panetta-warns-of-dire-threat-of-cyberattack.html?pagewanted=all.

145. *Cf.* CASS SUNSTEIN, REPUBLIC.COM 65 (2001) (group polarization and other pitfalls of an online public sphere); SUNSTEIN, INFOTOPIA/HOW MANY MINDS PRODUCE KNOWLEDGE (2006) (a decidedly more optimistic tour of Wikipedia and other cooperative knowledge building projects on the web); *see also* JARON LANIER, YOU ARE NOT A GADGET (2010); *see also* www.jaronlanier.com.

146. *See, e.g.*, TIM WU, THE MASTER SWITCH (2010) (describing information bottlenecks and market failures in the radio, telegraph, film, and telephone industries); *see also* description of "lower layer control" in note 34, *supra*, and accompanying text.

A. Beyond the Individual Speaker - a System of Communication Essential to Democracy

The essential quality of the Constitutional Court's speech jurisprudence is that it simultaneously protects an individual right, and the preconditions for public discourse. And indeed the two exist in a reciprocal relationship, as is reflected in the Court's mantra of "free individual and public opinion building."[147] Even before the Constitutional Court's first foray into electronic media (its first broadcasting decision in 1961), it had decided that speech was at the center of its value system, the "matrix" of every other freedom, and that self-government was the animating principle at the heart of speech.[148] By tying speech into a public discourse or "opinion-building," the Constitutional Court has explicitly and repeatedly situated speech and information freedom in the *process* of communication:

> Free opinion building takes place in a process of communication. On the one hand, it requires the freedom to express, distribute and publish opinions; on the other hand, [it requires] the freedom to hear the expressed opinion of others, to inform one's self. Inasmuch as Article 5, paragraph 1 of the Basic Law protects freedom of expression, freedom of publication, and freedom of information as human rights, *it seeks at the same time to protect this process constitutionally.*[149]

The concept of speech as process encompasses speaker and listener, content provider and information recipient. The goal is public dialog, a discourse that will drive both "individual and public opinion building."[150] The Germans see individual/subjective

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147. "Free individual- and public opinion building" (*freie individuelle- und öffentliche Meinungsbildung*) is a recurrent trope in the Court's decisions. *See, e.g., Constitutionalizing Communications, supra* note 1, at 131 n.109 (citing 83 BVerfGE 238, 315 (1991); *see also* 73 BVerfGE 118, 152 (1986)). This leads in turn leading to political will-building, elections, and democratic legitimacy for the government. *Id.* at 158 (*politische Willenbildung*).

148. *Lüth*, 7 BVerfGE 198, 208 (1958); *Constitutionalizing Communications, supra* note 1, at 101.

149. Fifth Decision, 74 BVerfGE 297, 323 (1987) (emphasis added), slightly different translation than offered at *Constitutionalizing Communications, supra* note 1, at 176; *compare* English translation on University of Texas website, note 6, *supra*. This or very similar language occurs throughout the trajectory of Constitutional Court broadcasting decisions. *See* Third "FRAG" Decision, 57 BVerfGE 295, 319 (1981); Sixth Decision, 83 BVerfGE 238, 295-96 (1991); Ninth Decision, 114 BVerfGE 371, 387 (2005).

150. 57 BVerfGE 295, 319 (1982).

and public/objective rights as two sides of the same coin, "whereby subjective - and objective - right elements condition and support one another."[151]

This speech conception, in the hands of Jürgen Habermas, became known as a "discourse theory" of speech.[152] Habermas was not a lawyer but a sociologist who taught himself constitutional law to better understand how constitutions structure discourse in the public sphere.[153] He has been able to escape some of the Constitutional Court's formalism, and re-express some of the Court's thought in a more robust (if for American ears still convoluted) manner. Echoing the Constitutional Court, he understands a sphere of private autonomy largely structured by negative liberties, and a sphere of public autonomy leading to self-government, where both exist "not as a zero sum game . . . based on an undialectical opposition," but as part of one continuum, one "intersubjective" loop:

> [Fully enfranchised citizens] can in turn adequately exercise their public autonomy, guaranteed by rights of communication and participation, only insofar as their private autonomy is guaranteed. A well-secured private autonomy helps 'secure the conditions' of public autonomy just as much as, conversely, the appropriate exercise of public autonomy helps 'secure the conditions' of private autonomy. . . .[154]

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151. *Id.* at 320 (*"wobei subjektiv- und objektivrechtliche Elemente einander bedingen und stützen"*). Several years later, the Fifth Decision reformulated this as "penetrate and support one another." 74 BVerfGE at 323 (*"einander durchdringen und stützen"*).

152. *See, e.g., Habermas, supra* note 68, at 1478, *passim.*

153. *Cf.* MATTHEW SPECTER & JÜRGEN HABERMAS, AN INTELLECTUAL BIOGRAPHY 28-34 (2012) ("the most decisive intellectual stimuli to his reformulation of Frankfurt School cultural pessimism came from his encounter with ... West German constitutional law").

154. Habermas, *supra* note 68, at 1544-45 ("not as a zero sum game" but "intersubjective"); HABERMAS *supra,* note 107, at 408. *Cf.* Constitutional Court's mantra of "free individual and public opinion building," a concatenation repeated in almost every opinion touching on communications freedom as discussed citations in note 147, supra. I do not mean to suggest, however, that Habermas and the Constitutional Court were always in complete alignment. In fact, Habermas had some severe hesitation about whether the Constitutional Court was prescribing values for the public, rather than rules that would allow the public to arrive at its values consensus. SPECTER, HABERMAS, AN INTELLECTUAL BIOGRAPHY, *supra* note 153, at 197 ("In 'the wording and tenor' of some important opinions of the Federal Constitutional Court, Habermas detected a tendency to treat the Basic Law '... not so much as a system of rules structured by principles, but as a 'concrete order of

Participating in the democratic discourse allows the individual to feel that s/he is not only subject to the laws, but is also a co-creator of them.[155] This specter inspires a "constitutional patriotism."[156] Habermas' "proceduralist" understanding of law, centered on the procedural conditions of a democratic process and an "unsubverted" public discourse, overcomes (he believes) the polarity between personal and public autonomy (the latter concretized *inter alia* in the electoral decisions of the citizenry).[157]

Similarly, the Constitutional Court has conceived of electronic communications freedom as incorporating constitutional protections for both broadcast speaker and information-recipient, and for individual and public opinion-building; the network is the place where

> different constitutional positions meet, and possibly collide . . . on the one hand the claim, based on information freedom, of a right to comprehensive and truthful information, on the other hand [the claim based on] the freedom of expression of those who produce the programming or speak in the broadcasts.[158]

Communications freedom thus protects a system of communication, and the individual in both speaking and receiving modes within

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values'").

155. Habermas, *Paradigms of Law*, 17 CARDOZO L. REV 771, 776 (1996) ("legal persons are autonomous only insofar as they can understand themselves at the same time as authors of the law to which they are subject as addressees").

156. *Habermas, supra* note 68, at 1481.

157. *See* Habermas, *supra* note 155, at 776:

> I would like to propose a proceduralist understanding of law that is centered on the procedural conditions of the democratic process. According to this view, the legal order is structured neither by the measure of individual legal protection for private-autonomous market participants nor by the measure of comprehensive social security for the clients of welfare-state bureaucracies. Although it is supposed to provide or guarantee both of these, they do not form the paradigmatic cases. In the proceduralist paradigm of law, the vacant places of the economic man or welfare-client are occupied by a public of citizens who participate in political communication in order to articulate their wants and needs, to give voice to their violated interests, and, above all, to clarify and settle the contested standards and criteria according to which equals are treated equally and unequals unequally.

158. 57 BVerfGE 295, 321 (1982) ("*Namentlich treffen verschiedene Grundrechtspositionen zusammen, die in Kollision miteinander geraten können, einerseits der aus der Informationsfreiheit folgende Anspruch auf umfassende und wahrheitsgemäße Information, andererseits die Freiheit der Meinungsäußerung derjenigen, welche die Programme herstellen oder in den Sendungen zu Wort kommen*").

that system. In this construct, speech happens on a network, but the network owners are not *ipso facto* speakers.

B. Duty of Legislature to Protect this System of Communication

In German jurisprudence, communications freedom is seen as an "objective value," i.e., not solely as an individual right, but as a framing value directed to society as a whole.[159] Objective values impose a "positive obligation on the state" to create the conditions under which the constitutional freedoms can be meaningfully exercised,"[160] and a *duty* on the part of the lawmaker to protect those constitutional values and rights through legislation and/or enforcement.[161] Thus, for example, in a 1972 case involving vocational training, the Court extrapolated from Section 12 of the Basic Law, which protects the "right to freely choose career, workplace, and educational or training path," to find a duty on the part of government to provide sufficient educational and training possibilities to make this choice real. "Without the factual prerequisites [for career preparation], the freedom to make such choices would be an empty promise [*wertlos*]."[162] Other German constitutional rights said to create duties because of their broad social implications are the freedom of research and teaching (*Freiheit von Forschung u. Lehre)* found in paragraph 3 of Article 5, and the rights of parents (*Erziehungsrecht*) found in Article 6 of the Basic Law (which, like broadcasting, is characterized as a "serving" freedom, and obligates the parent to act as trustee for the child).[163]

In information markets, the legislature has a positive duty to prevent "dominant opinion-making power" (*vorherrschende*

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159. *Constitutionalizing Communications, supra* note 1, at 130-33.

160. KOMMERS, *supra,* note 4, at 47 ("Every basic right in the Constitution - for example, freedom of speech, press, religion, occupation - has a corresponding value. A basic right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state to ensure that it becomes an integral part of the legal order"). Thus, says Kommers, "while basic rights apply *directly* to state action, they [also] apply *indirectly* to substantive private law" such as interpretations of the Civil Code. *Id.*

161. *See, e.g.,* 7 BVerfGE 198, 205-08 (1958); 74 BVerfGE 297, 323 (1987).

162. 33 BVerfGE 330-31 (1972).

163. Fink, *Wem dient die Rundfunkfreiheit? [Whom does Broadcasting Freedom Serve?]* 19/1992 DIE ÖEFFENTLICHE VERWALTUNG (DÖV) 805, 805 n.4-5 and accompanying text, (citing 59 BVerfGE 360, 377 (1982)); *see also* notes 102-03 *supra,* and accompanying text.

Meinungsmacht) in the nation's media.[164] The Constitutional Court's *NDR* or Fourth Broadcasting Decision, after setting out the legislature's responsibility to create a framework of balanced diversity in broadcasting, also charged legislators with continuing obligation to monitor the media marketplace to prevent a coming together of economic and journalistic power that could produce this "dominant opinion power."[165]

C. The Radiating Effect of Communications Freedom

Because communications freedom is an objective value, the Germans can apply it - like other constitutional standards - to the resolution of individual disputes, whether sounding in property, tort or contract law.[166] This is appropriate when a rote application of the civil law leaves constitutional rights unprotected. Once an objective constitutional principle is established, it is said to have a "radiating effect" on private-law relationships.[167]

This, and the related notion of "objective law," were developed by the Constitutional Court in its 1958 *Lüth* Decision. *Lüth* was in many ways similar to *New York Times v. Sullivan*.[168] The

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164. *See,* in place of many, 95 BVerfGE 163 (1996) (the *German Sports Television* Decision); *see also Constitutionalizing Communications, supra* note 1, at 120, 165-73.

165. 73 BVerfGE at 172, 175 (1986) (The "constitutional guarantee of free opinion building also requires that legal precautions be taken against dominant opinion power that might arise from a combination of influence in broadcasting *and* the press."), 180 (citing *Spiegel Search,* 20 BVerfGE 162, 175 *passim* (1966), for the proposition that "the development of opinion monopolies" poses dangers to a free press).

166. BARENDT, *supra* note 2, at 62 ("[constitutional] rights, in this case freedom of expression, create a system of values which must influence all spheres of law and shape the development of private law. Further, private law itself forms part of the 'general laws' which must be interpreted and applied in conformity with basic constitutional rights.").

167. A good discussion of these principles is found in KOMMERS, *supra* note 2, at 362-69. "[W]hile basic rights apply *directly* to state action, they [also] apply *indirectly* to substantive private law" such as the Civil Code (alterations added); *see also* Peter Quint's seminal article, *Free Speech and Private Law in German Constitutional Theory,* 48 MD. L. REV. 247, 277-78 (1989); and *West German Television Law, supra* note 1, at 155-56 (discussion of objective norms, as developed in the *Spiegel, Blinckfüer,* and *Lüth* cases).

168. New York Times v. Sullivan, 376 U.S. 254, 265 (1964). Both cases grew out of a perceived disparagement of an individual (alleged defamation of an Alabama sheriff, a call to boycott an ex-Nazi, respectively), and an attempt to recover

Constitutional Court overruled a lower court finding of liability under a civil statute regarding intentionally damaging acts, holding that a social and democratic "system of values" was incorporated into the Basic Law, and "must apply as a constitutional axiom throughout the whole system," i.e., in both public and private law:[169]

> . . . [T]he Basic Law is not a values neutral document [citations omitted]. Its section on basic rights establishes an objective order of values . . . This value system, which centers on the dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law [public and private]. Legislation, public administration, and adjudication all receive direction and impulse from this objective value system. Thus it clearly also influences the development of private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.[170]

In this case, the constitutional claims effectively trumped the German Civil Code, not because of some found state action (as in U.S. case of *New York Times v. Sullivan*),[171] but because of the magnetic pull of the constitutional value itself.[172] It was in the *Lüth*

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damages for same. The speaker in the *New York Times* case was the newspaper; in *Lüth* the speaker was a German legislator who called for a boycott of a director with alleged Nazi sympathies; in both cases, the complainant was the person attacked by the speech; in both cases the highest court acted to protect speech which otherwise would have been civilly actionable. State action did not figure in *Lüth* as it did in *New York Times*, German objective law concepts having rendered a finding of state action unnecessary. *See* discussion at note 170, *infra*.

169. 7 BVerfGE 198, 205 (1958) (translation partly from KOMMERS, *supra* note 2, at 363, and partly by the author).

170. *Id.* The *Lüth* court went on to state that:

> . . . The influence of the constitutional values system affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public* - in the broad sense of the term - that is, rules which for reasons of the general welfare are also binding on private legal relationships and are removed from the dominion of private intent.

Id. at 206.

171. *Sullivan*, 376 U.S. at 265 ("state action" found because "[a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press").

172. Kommers says of *Lüth*, "The court ruled that while basic rights apply *directly* to state action, they [also] apply *indirectly* to substantive private law." KOMMERS, *supra* note 4, at 49 (emphasis in original).

case that the German Constitutional Court most emphatically put the "constant intellectual exchange and contest among opinions" at the center of the German legal system.[173]

The radiating effect of German constitutional values obviates the need to find state action in order to apply these democratic values. In *Lüth* we saw it applied to civil damages law; in the merger issues in the *Sat1/Springer* case discussed below, we will see it applied to antitrust.[174]

D. An Empirical Focus - Market Censorship as Real as Government Censorship.

The German Constitutional Court's criticism of the marketplace is more fundamental than the European Union's economic focus on "significant market power,"[175] or the United States' theoretical bar to monopolies, or even the Supreme Court's occasional concern about market power and anti-competitive conduct in the information industry.[176] It is the German Constitutional Court's consistently expressed belief that the market by itself, and by definition, cannot provide for a fully democratic media. This sets its communications

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173. 7 BVerfGE at 208.

174. *Constitutionalizing Communications, supra* note 1, at 170-73.

175. The European model "establishes a harmonized, horizontal regulatory model that subjects [information and communications] industries to government oversight geared to remedy-specific instances of ineffective competition." Frieden, *supra* note 31, at 247, *see also Constitutionalizing Communications, supra*, note 1, at 213. Under the European Union's Framework Directive, "[a]n undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers." Directive 2002/21/EC of the European Parliament on a Common Regulatory Framework for Electronic Communication and Devices art. 14(2), *available at* http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en00330050.pdf; *see also* J. Scott Marcus, *The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications* 28 (FCC, OPP Working Paper Series No. 36 2002); J. Scott Marcus, *Europe's New Regulatory Framework for Electronic Communication in Action* 6 (2004) (unpublished manuscript), *available at* ftp://ftp.zew.de/pub/zew-docs/div/KT04/Paper_Marcus_Invited.pdf.

176. *See generally* Sherman Antitrust Act, 15 U.S.C. §§ 1-7; *see* 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"); *see also* Associated Press v. United States, 326 U.S. 1, 20 (1945) (anticompetitive conduct in information industry).

jurisprudence apart from that of the United States. In its Fourth Decision, the Constitutional Court put the case this way:

> Private programming is not adequate to the task of providing comprehensive information in full measure to the public . . . it does not communicate information across the full breadth of opinions and cultural currents in society. [177]

The Constitutional Court has looked beyond spectrum scarcity to a more generalized observation about the flattening affect of advertising on program content:

> Independent of [the scarcity rationale], one cannot expect from private broadcasters a broad array of programming, because the private broadcaster is dependent on income from business advertising. Such advertising income increases only when the private program reaches sufficiently high viewership. Broadcasters thus stand before the economic necessity of providing the most broadly attractive programs, designed to maximize listener and viewer numbers, and to do so at the lowest possible costs.[178]

The ConstitutionalCourt has consistently found that programs intended for small audiences may not be commercially viable, although they are important to the ecology of public opinion, "necessary to the complete array of information without which opinion building in a constitutional sense is impossible."[179]

This value judgment, although one of the mainstays of German media jurisprudence, has engendered sharp criticism both in Germany and in the United States.[180] Ironically, however, even the conservative political parties in Germany agree that it is commercially *impossible* to provide full and objective news coverage in an advertising-driven broadcasting environment (and thus, they argue, private broadcasters should be relieved of diversity and fairness obligations, with public broadcasters to play a

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177. 73 BverfGE 118, 155 (1986); *see also West German Television Law, supra* note 1, at 174-75 (quoting 57 BVerfGE 295, 322-23 (1982)).

178. 73 BVerfGE at 155. The German Court also noted the "extraordinary high cost of television programming," and the resulting "small number of broadcasters" active in Germany. *Id.* at 154-55.

179. *Id.* at 155-56.

180. *See, e.g.*, Uli Widmaier, *German Broadcast Regulation: A Model for a New First Amendment?* 21 B.C. INT'L & COMP. L. REV. 77, 107, 151 (1998) (German "values focus" constitutes an "elitist fallacy" and amounts to "governmentally created ethics of human interaction"); see further discussion in Part VI.A *infra*.

compensating role).[181]

The Court's later Decisions return repeatedly to the theme of market failure. The Court's September 2007 Decision, for example, measured the market's shortcomings against the ideal of "programming [that] captures the diversity of information, experience, values and behaviors in society."[182] The Court cited studies in media economics to support its view that "broadcasting has . . . in comparison to other goods, special economic characteristics."[183] The Decision described advertising-financed broadcasting as inevitably leading to a search for the largest possible audience, with a host of negative results: "standardization" of product; "erosion of public television's identity"; "one-sided reporting"; and the possibility that broadcasting would be "co-opted for extra-journalistic purposes, be they of a political or economic nature."[184]

> The pressures of economic competition and the ever-more difficult editorial effort to obtain the attention of the viewer often lead for example to reality-distorting presentations, the preference for the sensational, and the tendency to take from the reported

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181. 83 BVerfGE 238, 279 (1991) (discussing complainants' argument):
> Private broadcasters, because of their dependence on financing through advertising are, in fact, not in a position to fulfill these requirements. To the contrary, they must concentrate much more on entertainment broadcasts attractive to the masses in order to survive.

182. 119 BverfGE 181, 215-16 (2007).

183. *Id. citing* JURGEN HEINRICH, 2 MEDIENÖKONOMIE 24 (1999); WOLFGANG SCHULZ ET AL., PERSPEKTIVEN DER GEWÄHRLEISTUNG FREIER ÖFFENTLICHER KOMMUNIKATION 107 (2002). Heinrich references Ronald Coase's 1974 essay, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PAPERS & PROC. 384 (1974), but suggests that the two marketplaces are not co-extensive, or even substantially similar. Traditional economic categories such as use-value and trade-value do not fully capture the value of an idea or a media production in creating a public sphere, contributing to diversity of opinion, and (hopefully) enabling a search for truth and shared social values. HEINRICH, *supra*, at 46. Heinrich also suggests that viewer sovereignty is undermined by the fact that advertisers are more important customers for the broadcasting enterprise than are viewers, and it is the advertisers - rather than viewers or journalists - who determine the breadth and targets of any given programming. *Id.* at 44. Schulz, Held and Kops, on the other hand, start with the "methodological individualism" of Hayek's ROAD TO SERFDOM, and the "invisible hand" of Adam Smith, and focus more on market failure in the traditional sense, due to the scale of modern broadcasting or communications services, and the resulting ownership concentration in those markets. SCHULZ ET. AL., *supra*, at 107, 114-15 ("the model of atomized competition assumes many individual offerors and offerees . . .").

184. 119 BVerfGE at 215-16, 219-20.

subject only the peculiar, the scandalous.[185]

The 2007 Decision moves beyond the Court's fundamental criticism of the market, suggesting that the problems with advertising as a revenue base for the information industry are exacerbated by the increasing concentration in the information, communication, and entertainment industries:

> Other entities, such as investment funds with significant participation by international finance-investors, have become increasingly active in the broadcast area. Telecommunications companies are becoming active as the operators of the platforms for broadcast programming. The process of horizontal and vertical integration in the media markets marches on. The production and transmission of broadcast programming is often just a link in a multi-media production and marketing chain.[186]

The lesson for U.S. readers is not the specific contours of the problem identified or the specific solution chosen by the Constitutional Court (publicly financed broadcasting), but the fact that the Constitutional Court identifies the problem of private censorship in the first place, and has for fifty years placed that problem at the center of its communications freedom jurisprudence.[187] This perception surfaces occasionally in U.S. Supreme Court decisions, notably Justice Brennan's dissenting observation in *CBS v. Democratic National Committee* (see below) that "angry customers are not good customers and, in the commercial world of mass communications, it is simply 'bad business' to espouse - or even to allow others to espouse - the heterodox or the controversial."[188] But it is hardly a central strand of U.S. Supreme Court decision-making. The Germans, however, have pitted their view of information freedom - a concept of opinion-building that

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185. *Id.* at 215-16.

186. *Id.* at 216-17 (citations omitted).

187. *See also* 25 BVerfGE 256, 268-69 (1969) (*Blinckfüer*) ("The goal of freedom of the press - to encourage and protect the formation of free public opinion - thus requires protection of the press against attempts to suppress the competition of ideas by means of economic pressure"); Quint, *supra* note 167, at 277-78 n.100 ("the question of whether the [German] constitution limits a private person in any specific case may sometimes depend upon the social or economic power wielded by that person. The danger to objective constitutional rights presented by a person or group with strong social or economic power is naturally greater than the danger presented by other private individuals").

188. CBS v. Dem. Nat'l Comm., 412 U.S. 94, 187 (1973); see further discussion of the *CBS* cases in Parts V.B & V.C , and V.E *infra*.

requires the largest possible pool of information, from the most diverse sources[189] - against the information-constricting effect of the marketplace.

E. Where Constitutional Norms and Communications Facilities Meet.

There is recognition that broadcasting is moving onto the Internet, and thus onto the telecommunications network: "In the middle, namely as carrier . . . stands telecommunication."[190] The tendency of owners of transmission capacity to prefer affiliated traffic, and extract monopoly rents from non-affiliated content providers and other customers, has been noted in Germany:

> Network operators can, for example, erect financial hurdles, or use technical standards or access conditions of a technological or contractual variety as filters, or build in structural advantages or disadvantages to the marketing of certain products.[191]

These are for the most part relatively new problems and new realizations for the Germans, as their phone, broadcast and communications networks were government owned until the 1980s.[192] Like its American counterpart, the German Court's early broadcasting jurisprudence focused on the infrastructure issue of spectrum scarcity;[193] in later decisions it recast the scarcity rationale

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189. *Constitutionalizing Communications, supra* note 1, at 181 n.309, (citing HELGE ROSSEN, FREIE MEINUNGSBILDUNG DURCH DEN RUNDFUNK 185 (1988) ("the Constitutional Court . . . was intent on establishing an independent and stand-alone content for information freedom. By using the term 'comprehensive information' [27 BVerfGE 71, 81 (1969)] . [the Court] was signalling an extremely broad scope for this constitutional right on an objective level").

190. Ingwer Ebsen, *Öffentlich-rechtliche Rahmenbedingungen einer Informationsordnung,* DEUTSCHES VERWALTUNGSBLATT 1039-40 (1997).

191. Wolfgang Hoffman-Riem, *Medienregulierung unter Viel-Kanal-Bedingungen [Media Regulation in Multi-Channel Context], in* ÖFFENTLICHKEIT UNTER VIEL-KANAL BEDINGUNGEN 186-87 (Otfried Jarren & Friedrich Krotz eds., 1998). *See also, e.g.,* Martin Bullinger, *Regulierung unter Viel-Kanal-Bedingungen, in* ÖFFENTLICHKEIT UNTER VIEL-KANAL BEDINGUNGEN, *supra,* at 178, 180 (The "owner of the transmission capacity will endeavor to increase its share of Pay-TV value-creation by not transmitting external or third-party [*fremde*] programming to the public, but rather by acquiring programming rights, creating program packages, and offering them based on profitability concerns.").

192. *Constitutionalizing Communications, supra* note 1, at 110 n.35 and accompanying text.

193. *Id.* at 144 n.159 and accompanying text (citing 73 BVerfGE 118, 121 (1986)). In the first Constitutional Court broadcasting Decision, the Court insisted that ownership of transmission had to be separate from control of programming. *Id.* at

in terms of market failure, and ruled that the now partially-privatized transmission capacity had to be equitably apportioned between public and private broadcasters.[194] To date, the local media commissions have insured that public broadcasting has access to the facilities that it needs.[195]

Other issues at the nexus of conduit and content, sometimes expressed in the United States under the rubric of network neutrality, have not occurred in Germany to the extent they have here, perhaps because there is no German equivalent to the U.S. division of transmission facilities into those providing "information services" and those providing "telecommunications services."[196] When such problems do arise in Germany, the response tends to be calls for increased antitrust enforcement, and for extension of broadcasting and information freedoms into the online world.[197] More recently, the German *Bundestag*'s Investigatory Committee on "Internet and Digital Society" affirmed the view that constitutional norms of communications freedom also apply to the network

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194. *Id.* at 162 n.238 and accompanying text (citing 83 BVerfGE 238, 322-24 (1991)).

195. *Constitutionalizing Communications, supra* note 1, at 197-202, n.348-63 and accompanying text ("Broadcast Media in a Telecommunications World — Conflict between State and Federal Government").

196. *Cf. Cable Modem Ruling, supra* note 38; *see generally supra* notes 38-42 and accompanying text. Under German law, *all* forms of electronic transmission capacity are treated similarly as part of "the totality of transmission systems (*Gesamtheit der Übertragungsystemen*)." The German Telecommunications Law (*Telekommunikationsgesetz* or TKG) at § 3(27) defines "telecommunication network" as the "totality of transmission systems and, where applicable, switching and routing equipment as well as other resources, which make possible the transmission of signals over cable, broadcast, optical [fiber] and other electro-magnetic equipment, including satellite networks, wireline and mobile terrestrial networks, power line distribution inasmuch as it is used for signal transmission, networks for radio and television as well as cable networks, all independent of the transmitted content"). A slightly but not materially different English version of the TKG is available at http://www.bfdi.bund.de/cae/servlet/contentblob/411286/publicationFile/25386/TelecommunicationsAct-TKG.pdf (website of German Commissioner for Data Protection & Information Freedom). After a 2012 Amendment, the § 3(27) definition of the network was, if anything, broader, specifically including dark fiber ("*nicht aktiven Netzbestandteile*") and IP-enabled or "packet-mediated networks including the Internet" ("*und paketvermittelten Netzen, einschließlich des Internets*"). *See* http://www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/tkg-nicht-kosolidierte-fassung-2012,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

197. Hoffmann-Riem, *supra* note 191, at 186.

neutrality issue:

> The Federal Constitutional Court sees information and reception freedoms as essential elements of a well-fortified [well-defended] democracy. According to the Court's decision in the *Leipziger Newspaper* case in 1969, the right to freely inform one's self includes not only the simple reception of information, but also the active and unhindered procurement of information. "Unhindered" in this instance means to be free from legally ordered or factually determined [state] censorship, restraint, guidance, control, registration, and even "free from unreasonable delay." Transposed to the theme of net neutrality, this means that one data stream should not be preferred over another, and should not be blocked, or slowed down, as any of these actions hinders or delays the free and equal exchange of information.[198]

The Constitutional Court has not yet, however, directly confronted these questions.

V. In United States Jurisprudence, the Triumph of the No Law Approach to the First Amendment.

In the modern era, the Supreme Court has properly interpreted the First Amendment's "no law . . . abridging the freedom of speech" as a ban on government censorship. That fight was itself long and arduous, but the anticensorship forces won out, and today in the U.S. government can neither stop communists from leaving their literature at the local bookstore,[199] nor adolescents from wearing jackets emblazoned with "F[*]ck the Draft."[200] This is an

198. Enquete-Kommission "Internet und Digitale Gesellschaft," report on Netzneutralität, at 40 (February 2, 2012), available at http://dip21.bundestag.de/dip21/btd/17/085/1708536.pdf. (The sentence with the word [state-structured] in brackets presents translation issues; here is the original: "Ungehindert bedeutet dabei frei von rechtlich angeordneter oder faktisch verhängter staatlicher Abschneidung, Be hinderung, Lenkung, Registrierung und sogar 'frei' von unzumutbarer Verzögerung"). Further complicating the translation issues here is the lack of a "state action" problem in German constitutional law, due to the "radiating effect" of constitutional norms. *See* Part IV.C *supra*.

199. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) *overruling* Whitney v. California, 274 U.S. 357 (1927) (affirming the conviction of Ms. Whitney of violations of California's Criminal Syndicalism Act, i.e., advocating the Communist Party belief in overthrow of the United States).

200. Cohen v. California, 401 U.S. 15 (1971). In dissent, Justice Blackmun suggested that Cohen's stunt was conduct, not speech (an "absurd and immature antic"), and urged that the case be remanded to the California courts for further consideration. *Id.* at 27-28.

important story well told by others, but it is not our subject here.[201]

When speech began to interact with large, industrial forces in the mid-20th century, two parallel but opposed developments took place.[202] First, for several decades, the Court endorsed attempts to protect speech on the airwaves, and in other commercially controlled spaces, formulating what could be called an American doctrine of information freedom. Secondly, commercial interests began to push back, invoking the "free speech" clause for their own purposes, as a protection against government regulation of all types, often having little or nothing to do with their political speech, and at times even diminishing the speech and information interests of third parties.

A. Intimations of Information Freedom

As modern mass culture developed, the Court evinced a growing awareness of a need to protect the free flow of ideas and information. The Court developed a First Amendment right to receive information, and increasingly put that right on the scales when balancing competing speech interests. In *Grosjean v. American Press Co.*, the Court confronted a Louisiana license tax on newspapers of over 20,000 circulation, animated by the interests (if not sprung from the brain) of Sen. Huey Long, who called it a "tax on lying."[203] The *Grosjean* Court looked back at the Amendment's antecedents, and attempted to assay the intent of its drafters, locating that intent most immediately in the founders' reaction to the "persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize . . . the agencies and operations of the government"; reaching back further, the Court cited Milton's 1644 "Appeal for the

201. *See, e.g.*, ANTHONY LEWIS, FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).

202. An even broader point could be made here. The first detailed treatment of the First Amendment did not occur until 1876 in United States v. Cruikshank, 92 U.S. 542 (1876), and even there the Court's analysis was cursory and arrived at the conclusion that the First Amendment did not apply to the states. *Id.* at 552-53. The relative late development of this part of the Constitution allows the surmise that the First Amendment's latent meanings have only surfaced as modern forms of communication have emerged.

203. Grosjean v. American Press Co., 297 U.S. 233 (1936); *see also* Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2229-30 n.428-29 (1992) (citing Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575, 579-80 (1983) (describing the historical background of the *Grosjean* case)).

Liberty of Unlicensed Printing," and found that "mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press."[204] The Court held that the license fees at issue violated the First Amendment because they were "taxes on knowledge" and they had "the *effect* of curtailing the circulation on newspapers."[205] "In the ultimate, an informed public opinion was the thing at stake," and vigilance was necessary regarding "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[206]

Nine years later, with World War II drawing to a close, the Supreme Court addressed a much larger and electronically connected association of newspapers than the hundred plus newspapers whose taxes were at issue in *Grosjean.* Appellant Associated Press (AP) was a cooperative of more than 1,200 newspapers, appealing an antitrust judgment obtained by the Department of Justice. At issue in *Associated Press v. United States* were the AP's Bylaws which prohibited AP members from selling news to nonmembers. The Court rejected AP's First Amendment challenge to the judgment that invalidated these bylaws, by turning AP's argument around, one might say from shield to sword:

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. *That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.* Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.[207]

There are several aspects of this case which are thematic

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204. *Grosjean*, 297 U.S. at 245-46.

205. *Id.* at 246, 251(emphasis added).

206. *Id.* at 247, 249-50.

207. Associated Press v. United States, 326 U.S. 1, 20 (1945) (emphasis added).

cornerstones for a discussion of information freedom in the United States: the fact that the U.S. government had intervened in an information market and specifically addressed "non-governmental" information bottlenecks; the Court's systemic approach that placed the information needs of the public on equal (or higher) footing than the speech rights of the press; and the discussion of whether information markets are the same as markets for other goods. As to the latter, Justice Black's majority opinion identified principles common to both types of markets: "The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate [antitrust] laws regulating his business practices."[208] Justice Frankfurter's concurring opinion emphasized the unique aspects of information markets:

> But in addition to being a commercial enterprise, [the Associated Press] has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. I find myself entirely in agreement with Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; *it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues,* than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[209]

In the twenty-two years between *Associated Press* and *Red Lion,* the Court cited *AP's* "widest possible dissemination of information"

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208. *Id.* at 7.

209. *Id.* at 28 (quoting Judge Learned Hand's opinion in the Court below, United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (emphasis added).

rationale only once, in *New York Times v. Sullivan.*[210] While not taking the critical step of locating First Amendment rights in The Times' readers or the public at large, as *Red Lion* would do, the Court in *New York Times* nevertheless prepared the country for that step by again stressing how critical access to the widest possible diversity of opinion was for self-government. Justice Brennan, writing for a unified Court, quoted the "multitude of tongues" language from *Associated Press,* and underlined this with a quote from Justice Brandeis in *Whitney v. California,* emphasizing the public aspect of speech:

> Those who won our independence believed . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. . . Believing in the power of reason as applied through public discussion, they . . . amended the Constitution so that free speech and assembly should be guaranteed.[211]

The stage was set for *Red Lion.*

B. Red Lion and Its Afterlife

In 1967, ruling on a case that grew out of name-calling, personal attacks, and demands for rebuttal time during Barry Goldwater's 1964 presidential campaign, the Supreme Court in *Red Lion Broadcasting v. FCC* endorsed "information freedom" as a right that belonged to listeners, viewers, and the public.[212] The decision went

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210. New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (defamation judgment in favor of public figure incompatible with "widest possible dissemination of information from diverse and antagonistic sources," absent a showing of malice).

211. *Id.*

212. Red Lion Broadcasting v. FCC, 395 U.S. 367, 371 (1969). In 1964, Red Lion Broadcasting Co. broadcast a 15 minute program by the Reverend Billy James Hargis as part of a "Christian Crusade" series, in which the Rev. Hargis attacked one Mr. Cook:

> Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER - EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. ... After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies . . .

significantly beyond its facts, beyond upholding the so-called Fairness Doctrine (the immediate subject of contention), and certainly beyond the "frequency scarcity" rationale to which the case and the Doctrine are often linked.[213] The Court spoke of a democratic understanding of speech, and did so in the broadest and most far-reaching terms possible:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[214]

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395 U.S. at 373. Mr. Cook (alone among those referenced in the broadcast) wrote to Red Lion and demanded equal time under the "personal attack" doctrine, one of two prongs of the Fairness Doctrine. The station responded that it would supply equal time if Mr. Cook would pay for it or declare under penalty that he could not afford it. The FCC ruled that the station was obligated not only to provide equal time on request, but also to send Mr. Cook a transcript, and offer him free time. 395 U.S. at 372.

The parties also argued about scarcity, with the FCC contending that a frequency scarcity justified imposition on a broadcast speaker's qualified (by license) First Amendment rights. Red Lion argued that there were more radio stations than magazines in the U.S., and at least 9 radio stations were available to residents of the small Pennsylvania town in which Red Lion was located.

213. Lillian BeVier, *Red Lion Broadcasting Co. v. FCC: a Different Perspective on the First Amendment Cathedral in* RICHARD GARNET & ANDREW KOPPELMAN, FIRST AMENDMENT STORIES 319, 327, *passim* (2011).

214. *Red Lion*, 395 U.S. at 390 (emphasis added) (citing a wide array of references supporting a democratic theory of speech: FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 361-362 (1955); 2 ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 546 (1947); Associated Press v. United States, 326 U.S. 1, 20 (1945); New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). *See* Justice William Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) (emphasis added).

The facts of this case are, however, much messier than the Court's broad rhetoric,

What the Court in *Red Lion* did *sub rosa* was to balance the rights of speaker and listener, or balance among the rights of various speakers:

> The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.[215]

As problematic as it is, some form of balancing between different speakers and listeners, readers, and network users is inevitable on electronic networks,[216] and echoes down through subsequent Supreme Court decisions.[217]

One could write separately, and at length, on the many factual involutions and layers of intrigue around *Red Lion*: Two days of Supreme Court argument, followed by a ruling upholding the Fairness Doctrine, only to have that Doctrine subsequently declared unconstitutional (after a change of Administration) not by the Court, but by the Agency that propounded it; as well as its continued citation, often in strangely inappropriate settings, long after the broadcast spectrum scarcity on which it was based had ceased to be the primary bottleneck in the delivery of video programming to the public. Much has already been written on the rise and fall of *Red Lion,* and I will not attempt to duplicate it here.[218] What matters now, fifty years later, is the constitutional principle which the case established for speech on electronic networks: "it is the rights of viewers and listeners . . . which are paramount."

Red Lion was the seminal statement of this principle, and must

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and reveal - if anything - what a rickety mechanism the Fairness Doctrine was. As suggested in the previous footnote, the Fairness Doctrine was often not self-executing, and parties seeking network access were often put to the task of drafting, if not filing and litigating, a complaint to obtain network access.

215. *Red Lion*, 395 U.S. at 387 (citing Associated Press, 326 U.S. at 20).

216. The very concept of "balancing" is an anathema to many constitutional scholars and First Amendment absolutists, but seems unavoidable given the plurality of interests involved, especially in cases of speech on electronic networks. *See* discussion in note 368 *infra* and accompanying text.

217. *See* CBS v. Dem. Nat'l Comm., 412 U.S. 94, 102 ("Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty"); CBS v. FCC, 453 U.S. 367, 397 (1981) ("We hold that the statutory right of access, as defined by the Commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters"); *see also Turner I* and *Turner II,* discussed *infra.*

218. *See generally,* BeVier, *supra* note 213; FISS, *supra* note 3, at 58-74.

be understood as recognition for a First Amendment right to receive information. For several decades, it enjoyed a robust afterlife. The "right of the viewers and listeners," and of the "public to receive suitable access to . . . ideas," tipped the scales in favor of information freedom in several important cases. Seven years after *Red Lion,* in ruling on a case brought by the Virginia Citizens Consumer Council seeking to overturn a ban on price advertising imposed by the Virginia Board of Pharmacy, the Court upheld the standing of the consumer group as an information recipient, and - more importantly - identified the *process* of speech as the protected object of the First Amendment:

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, *the protection afforded is to the communication, to its source and to its recipients both.* This is clear from the decided cases. In *Lamont v. Postmaster General,* 381 U.S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in *Kleindienst v. Mandel,* 408 U.S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech "'necessarily protects the right to receive.'" There are numerous other expressions to the same effect in the Court's decisions. See, e.g., *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965); *Marsh v. Alabama, 326* U.S. 501, 505 (1946); *Thomas v. Collins,* 323 U.S. 516, 534 (1945); *Martin v. Struthers,* 319 U.S. 141, 143 (1943). If there is a right to advertise, *there is a reciprocal right to receive the advertising,* and it may be asserted by these appellees.[219]

In a 1978 commercial speech case brought by the commercial speaker itself, *First National Bank of Boston v. Bellotti,* the Court sidestepped the question of whether the Bank appellant was a First Amendment speaker, but used the occasion to provide a strong endorsement of an information freedom that echoes the German notion of an objective right, a constitutionally protected "interest[] broader than those of the party seeking their vindication," and again held that it was more important to protect the speech than the speaker:

> The Constitution often protects interests broader than those of the

219. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 (1976) (emphasis added).

> party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.[220]

Two years later, in *Richmond Newspapers, Inc. v. Virginia,* the Court overturned a trial judge's ruling excluding the public from a murder trial, and issued a ringing endorsement of the public's right to access information (but did so without mentioning *Red Lion*), once more referring to (what the Germans would call "objective") interests broader than the individual, and the "stock of information" in general: "[The] First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw . . . In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'"[221]

In 1981, the Court cited *Red Lion* in upholding a statutory right of candidates to purchase airtime, favoring the rights of viewers and political speakers over broadcasters, in a head-to-head rematch of

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220. First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (rejecting a Massachusetts law that forbade corporate electoral advertising during election season). The focus here on the speech act or process may have been a convenient way for the Court to sidestep the question posed by the Massachussetts Supreme Court's ruling that the Bank as a corporation did not have full First Amendment rights. *Id.* at 771-72. Whether from conviction or to avoid the still-unresolved question of corporate rights under the First Amendment, the Court in *First National Bank* was uncommonly effusive about the public's information rights: "[The] First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 783. *First National Bank's* recognition of "interests broader than those of the party seeking their vindication" echoes the concept of objective rights under German law, rights that are broader than any individual, and that frame the democratic state. *Constitutionalizing Communications, supra* note 1, at 130-34, describing objective rights as "shaping law."

221. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980). Although the Court in *Richmond Newspapers* does not cite *Red Lion,* it cites Kleindienst v. Mandel, which had an extensive discussion of *Red Lion* and information freedom: "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'" 448 U.S. at 576, (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (finding the public's information rights insufficient to require the government to give a visa to a well-known Belgian communist)).

CBS v. Democratic National Committee, this time styled as *CBS v. FCC*[222] ("The First Amendment interests of candidates and voters, as well as broadcasters, are implicated"). In 1984, in *FCC v. League of Women Voters,* the Court relied on "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas" to overturn a ban on editorials in public broadcasting.[223] The year 1990 marked the last successful turn for information freedom in the highest Court, when the Court in *Metro Broadcasting v. FCC* upheld the FCC's minority ownership rules based in large part on the rights of viewers and listeners first identified by the Court in *Red Lion.*[224]

But from the late 70s forward, these voices retreated and were more often heard in dissent, in cases such as *Herbert v. Lando* and *Houchins v. KQED.*[225] An exception to this trend, and to the rule that important communications infrastructure cases are decided in a constitutional vacuum, was Judge Greene's decision in the trial court, approving the breakup of AT&T in 1982.[226] This landmark case came at a time when the future power of the Internet was glimpsed as "electronic publishing." Here, Judge Greene was prescient:

> The threat to competition that is claimed to be posed by AT&T in this industry is that, through the use of cross-subsidization and customer discrimination, it will use its power in the interexchange

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222. *CBS,* 453 U.S. at 395-96. Eight years earlier, as described below, the Court had gone the other way in another CBS case, *CBS v. Democratic National Committee.* In the earlier case, the DNC had relied not on a specific statute, but on general arguments regarding a broadcaster's public trustee role and the First Amendment. 412 U.S. at 99-100.

223. FCC v. League of Women Voters, 468 U.S. 364, 377 (1984). Justice Steven's dissent also cited *Red Lion* and a public's right to know, but found them outweighed by the dangerous spectre of government financed editorials. 468 U.S. at 408-16 n.8.

224. Metro Broadcasting v. FCC, 497 U.S. 547, 567 (1990) (ruling not in favor of minority broadcasters but "the people as a whole"). The Court does not use the "right of the public" verbiage from *Red Lion,* but does speak in general terms of the "public interest" in information access and diversity. *Id.*

225. *See, e.g.,* Herbert v. Lando, 441 U.S. 153, 187-89 (1979) (Brennan, J. dissenting) ("great mistake to understand . the First Amendment solely through the filter of individual rights . . the 'press and broadcast media' have played a dominant and essential role in serving the 'information function' protected by the First Amendment") (citations omitted); Houchins v. KQED, 438 U.S. 1, 32 n.19, 34 (1978) (Stevens, J. dissenting) ("The question is whether petitioner's policies, which cut off the flow of information at its source, abridged the public's right to be informed about these conditions").

226. United States v. AT&T, 552 F. Supp. 131, 181 (D.D.C. 1982).

market to disadvantage competing electronic publishers.[227]

Judge Greene fully understood the constitutional dimensions of network architecture, saw the ramifications of AT&T's potential monopoly for public discourse, and recognized the First Amendment implications of the Consent Decree:

> [T]he Court must take into account the decree's effect on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public. Consideration of this policy is especially appropriate because, as the Supreme Court has recognized, in promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws.[228]

Judge Greene was concerned that "[d]uring the last thirty years, there had been an unremitting trend toward concentration in the ownership and control of the media," realized the potential reach and impact of what was then still primarily a voice transmission network, and placed his decision fully within the U.S. tradition of information freedom, citing both *Red Lion* and *Associated Press* and their concern for "the widest possible dissemination of information from diverse and antagonistic sources."[229]

During the twenty years following *Red Lion,* while the Supreme Court made efforts to work out the law and theory of information freedom, it also was engaged in an increasingly obvious retreat from the strong statement it had made in the 1969 case. During this era, the concern for diverse and antagonistic sources did not carry the day in cases such as *PG&E v. Public Utilities Commission* (discussed below), which failed to consider the rights of information recipients as established in *Red Lion. Red Lion* does makes a cameo appearance in the Supreme Court's *Turner* cases, in which the Court held that considerations of both competition and information diversity justified enactment of cable "must-carry" rules. In *Turner I,* the majority held (without referencing *Red Lion*) that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment," but did cite *Red Lion* for the kind of scarcity that will always exist with top-down network control:

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227. *Id.* at 181.

228. *Id.* at 184.

229. *Id.* at 183-85.

> [W]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. [230]

Nonetheless the most salient part of *Red Lion* - that individuals and the public have a right to access and receive information - has had an increasingly dodgy career in subsequent years. By 1996, its stock had declined to the point where Justice Thomas could claim it almost entirely irrelevant:

> In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." After *Turner*, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent.[231]

Since then, *Red Lion* has been the whipping boy for anyone who thought the Fairness Doctrine might return, or that a public right to information and ideas represents a foreign body in U.S. constitutionalism, a juvenile mistake that needs to be eradicated and atoned for.[232]

C. Retrenchment and Ascendency of Subjective, "Negative Freedom" Model.

Four years after *Red Lion*, the Court began a retrenchment on information freedom. In a series of decisions, the Supreme Court rejected rights of access to the media, and ignored or gave short shrift to the rights of third party speakers as well as the public's interest in "the widest possible dissemination of information and opinion."

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230. Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) (*Turner I*), *aff'd after remand*, Turner Broadcasting Sys. Inc. v. FCC, 520 U.S. 180, 186 (1997) (*Turner II*) ("[w]e have identified a corresponding 'governmental purpose of the highest order' in ensuring public access to 'a multiplicity of information sources'").

231. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 816 (Thomas, J., dissenting, joined by Justices Rehnquist and Scalia) (internal citations omitted).

232. *See, e.g.*, Thomas Hazlett et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51 (2010); *see also* BeVier, *supra* note 213 (both confining their discussion of *Red Lion* to its factual setting, a perceived spectrum scarcity, rather than exploring the decision's affirmation of a public right to information).

First came *CBS v. Democratic National Committee,* 412 U.S. 94 (1973), in which Chief Justice Warren Burger, like the *pater familius* of a divided house, first paid homage to *Red Lion,* and then moved it from its privileged place at the table.[233] Two groups - the Business Executives' Move for Vietnam Peace, and the Democratic National Committee - had sought to purchase airtime from CBS during the 1972 Democratic Convention for political advertising. CBS refused to sell. The groups sued based on the First Amendment, the public trustee duties of CBS under the Communications Act, and the Fairness Doctrine. The Court ruled that the DNC could not compel CBS' sale of advertising time, even at market rates, for a political message. The Court acknowledged *Red Lion* and the concept of the rights of viewers and listeners, but then engaged in a "[b]alancing [of those] the First Amendment interests" with those of the broadcaster, a "task of a great delicacy and difficulty."[234] At the end of the day, the rights of the network owner were re-installed as the favored right.[235]

Next up was *Miami Herald v. Tornillo,* where the Court rejected a right of reply statute as violative of the *Miami Herald* publisher's First Amendment rights), with no mention of *Red Lion* or the information rights of readers.[236]

The increasing eclipse of information freedom can be seen in three types of "ownership as speech" cases. First came the cable television cases. Ten years after *Red Lion,* in *FCC v. Midwest Video Corp.,* the Court agreed that network owners' desire to be free of community access requirements raised "grave First Amendment problems," with no mention of the rights of viewers, listeners, or the public.[237] In *City of Los Angeles v. Preferred Comm'ns,* the cable owner's putative First Amendment rights trumped the municipality's attempt to extract public interest undertakings in exchange for use of city streets and easements, with no mention of the rights of viewers, listeners, or the public.[238] These decisions have allowed Prof. Yoo to argue for the "importance of giving the conduit [owner] editorial control over the information being

233. CBS v. Dem. Nat'l Comm., 412 U.S. 94, 101 (1973).

234. *Id.* at 102.

235. *Id.* at 125.

236. Tornillo v. Miami Herald, 418 U.S. 241, 258 (1974).

237. FCC v. Midwest Video Corp., 440 U.S. 689, 699-70 (1979).

238. City of Los Angeles v. Preferred Comm'ns, 476 U.S. 488, 494-95 (1986).

conveyed," even in the face of the readily apparent market power which the conduit's owner can exercise.[239]

In the cable "network" cases, there was no specific speech of the network owners at issue, just the possibility that they (and they alone) might want in the future to rearrange the priorities of their transmission, or select programming to sell their customers over the remaining channels. Although these are two different things - the transmission of content (now bits on a broadband conduit), and the selection of programming on a cable television system - they are often conflated in the current dialogue.[240] Neither represents communicative action as described above. More troubling is the apparent readiness of some jurists to accept bit-transmission as a form of speech, a view that positions the cable owner/operator, *qua* owner/operator of the entire network, as First Amendment speaker.[241]

Stripped to their essence, the claims of the network operators in *Preferred* and *Midwest Video* (and indeed in the subsequent *Turner I* and *Turner II* cases) were based on lost business opportunities rather

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239. Yoo, *supra* note 45, at 46-47 n.169-180.

240. I argue below that even the selection of content is not "speech" or editorial activity, but merely the placement of product on a digital shelf. *See* Part V.D *infra*; *see also* note 242, *infra*, and accompanying text.

241. *But see* Benjamin, *supra* note 21, at 1689-90 (distinguishing cable cases from bit transmission). Part of the judiciary's confusion between bit-carriage and cable television programming stems from the fact that cable cases like *Midwest Video* and *Preferred*, and even *Turner I* and *Turner II*, were decided in an era when cable systems were primarily purveyors of entertainment and news programming on their "57 channels," and long before cable became a serious competitor to the telecommunications utilities as a provider of broadband Internet access. For example, in *Preferred*, the full sentence using the "communication of ideas" phrase quoted by Petitioner, reads "*Cable television* partakes of *some* of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers Respondent's proposed activities would seem to *implicate* First Amendment interests " 476 U.S. at 494 (emphasis added); *cf.* Bruce Springsteen, *57 Channels (and Nuthin's On)* (1992). Even in the context of cable television, the cable operator's speech claims are attenuated, as on most of these channels the speech was not the cable operator's but that of independent producers (the exception being the local origination channels where the cable operator actually programmed its own content). For this reason, the Nixon White House first suggested that even cable television's carriage of third-party television programming should be structured as a common carrier service, a view rejected by the [1984 Cable Television Act]. *See Cable: Report to the President, 1974* (sometimes called the "Whitehead Report"), at 29, hopefully soon again *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/37/1c/5a.pdf.

than frustrated speech. "Cable operators are not very much like orators or authors in the Romantic sense. They are shopkeepers who price and deliver a product."[242] The Germans, by contrast, appear to view the feeding (*Einspeisung*) of programming into the cable network more as a shopkeeper's resale activity than a newspaper's editing.[243]

A second species of ownership-as-speech jurisprudence comes in the "exclusion" cases. In a series of decisions, the Supreme Court has rejected right of reply or other rights of third party speakers to the owned media, again on the argument that the speech of third parties interfered with the owner's speech. *See CBS v. Democratic National Committee, supra* (DNC not allowed to compel CBS' sale of advertising time, even at market rates, for a political message); *Tornillo v. Miami Herald, supra* (right of reply statute violated publisher's First Amendment rights); *PG&E v. California Public Utilities Commission,* (First Amendment "concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press").[244] *PG&E* was especially problematic because the contested space - the extra space in the billing envelope sent by the energy utility - was deemed under California law to belong to the ratepayers, not the company; nevertheless, the ratepayers' speech was excluded.[245] In these cases, the primary effect of a recognized negative speech right in the network owner is to exclude and thereby to negate the speech rights of unaffiliated third parties.

A third variant of ownership-as-speech rationale may be glimpsed in the campaign finance cases, where money - a form of ownership - is equated with speech.[246] The Court's decision two years ago in *Citizens United* can be seen as the apotheosis of a money

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242. *See* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation,* 42 B.C. L. REV. 1, 78 (2000).

243. *See, e.g.,* Karl-Heinz Ladeur, *Rechtsproblem der Regulierung der Entgelte, der Paketbündelung und der Vertragsgestaltung im digitalen Kabelfrensehen,* 1/2005 ZUM 1, 5 (cable operator as "reseller" rather than speaker).

244. PG&E v. California Public Utilities Commission, 475 U.S. 1, 11 (1986).

245. *Id.* at 6, 22-23.

246. *See* Buckley v. Valeo, 424 U.S. 1, 67 (1976) (First Amendment right to contribute to political campaign, notwithstanding claims that this would vitiate the overall vitality of the political debate); Citizens United v. FEC, 130 S. Ct. 876 (2010); *see also* Owen Fiss, *Free Speech and Social Structure,* 71 IOWA L. REV. 1405, 1407-08 (1986) ("money is speech").

as speech rationale, and reveals the persistent confusion and tension between negative and affirmative speech freedoms. A fuller consideration of the ramifications of that decision is beyond the scope of this article.

Having dispatched *Red Lion* to irrelevancy, the Court has increasingly looked with favor on the use of the First Amendment to invalidate regulations. This is also can be seen as a variation on the meme of ownership as speech.[247] Use of the First Amendment as a shield for entrepreneurial freedom rather than speech freedom, or as a sword to dismantle consumer protection and public interest legislation, has been referred to as "First Amendment Lochnerism."[248]

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247. The transformation of communication freedoms into entrepreneurial freedoms is often noted in the German literature. *See, e.g.*, Wolfgang Hoffmann-Riem, *Rundfunkrecht und Wirtschaftsrecht - ein Paradigmawechsel in der Rundfunkverfassung [Broadcasting Law and Commercial Law - a Change of Paradigms in the Constitution of Broadcasting]*, *in* MEDIA PERSPEKTIVEN 57, 60 (1988). (over time, "the externally pluralistic model [of broadcasting freedom] has been is emptied of its group-theoretical justification, and understood [more] as the prototype of an orientation of broadcasting constitution on the constitution of the economic marketplace. Journalistic diversity is supposed to be made possible by economic competition"); Stock, *supra* note 125, at 290 (contrasting the understanding of Article 10 speech freedoms of the European Convention on Human Rights as more of "an entrepreneurial right" [*Unternehmerfreiheit*], with the Constitutional Court's jurisprudence of broadcasting freedom as a "functional, 'serving,' journalistic-professional right"); Hoffmann-Riem, *supra* note 127, at 103 ("communication rights are becoming economic goods like any other [such goods]," causing an "erosion of the journalistic specialness of mass media").

248. *See* Symposium, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non- Speech Economic Activity*, 33 N. KY. L. REV. 365 (2006) (Prof. Katkin, noting that "the Supreme Court and some lower courts have arguably begun to apply stringent First Amendment 'free speech' standards when reviewing the constitutionality of a variety of government efforts to regulate business or economic activities-often in cases in which the regulations at issue do not appear directly to implicate traditional First Amendment concerns about government censorship") (citing Thompson v. W. States Med. Ctr., 535 U.S. 357, 378 (2002) (invalidating on First Amendment grounds provisions of the Food, Drug, and Cosmetic Act that prohibited manufacturers from marketing drugs for uses not yet proven safe and effective); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (rejecting legislation protecting children from tobacco advertising, because "tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication"); see also Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 616-18 (1990) (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York 447 U.S. 557, 574 (1980) (First Amendment used to invalidate state regulation banning utility promotion of electricity use during energy crisis), PG&E v. California Public Utilities Commission, 475 U.S. at 1, 22-23 (invalidating mandated use of extra space in PG&E billing envelopes for

This approach had been rejected by the Court in *Associated Press v. United States*: "Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act . . ."[249] The largest telecommunications carriers in the country, however, seek a similar refuge in the First Amendment. In the FCC's "Open Network" proceeding, the subject of Verizon's pending appeal, the carriers denied they exercised market power, while arguing that their First Amendment speech rights should trump the rights of millions of network users. AT&T flatly asserted that "the proposed rules would violate the First Amendment" rights of AT&T as a network owner.[250] Verizon argued that "the [proposed] rules would raise serious constitutional problems under both the First and the Fifth Amendment's Takings Clause."[251] The National Cable Television Association followed suit, alleging that "government attempts to dictate 'parity' with respect to private speech are fundamentally illegitimate."[252]

consumer-related messages), as well as First Amendment attacks on SEC disclosure requirements and rules affecting stock offerings.

249. Associated Press v. United States, 326 U.S. 1, 7 (1945).

250. *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52 [hereinafter *Open Internet Proceeding*] (Jan. 14, 2010), AT&T comments at 235-41; *see also id.* at 16-17 ("Such rules are particularly indefensible when they implicate First Amendment concerns, as these would, by precluding market actors from enhancing particular messages to communicate more effectively with the public. The rules also would create an uncompensated taking of broadband networks in the service of dubious social objectives").

251. *Id.* Verizon comments at 11, Jan. 14, 2010.

252. *Id.* National Communications and Telecommunication Association (NCTA) comments at 50 (Jan. 14, 2010).

D. An Incompletely Theorized Freedom of Speech[253]

First Amendment interpretation often appears to be a motley fabric stiched together from a number of *ad hoc* determinations, perhaps because of the Supreme Court's penchant for "minimalist" decisions that address no more than the matter before them.[254] This incompleteness, if not incoherence, is manifest on (at least) two levels: (1) the macro-constitutional question of whether and to what extent the First Amendment serves the purposes of public autonomy, that is, whether free speech is a "right of the public to receive suitable access to social, political, aesthetic, moral and other

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253. I am indebted to Professors Sunstein, Benjamin, and others for the phrase "incompletely theorized." As Benjamin wrote in a recent article:

> Do lawyers and judges need to adopt a particular conception of the First Amendment in order to decide what the freedom of speech encompasses? Part of the significance of this question arises from the fact that this approach approximates the position of the Supreme Court. Text, history, Supreme Court jurisprudence, basic analogical reasoning, and widely accepted conceptions are not only lawyers' but also the Supreme Court's basic toolkit. And the Court has never settled upon a conception of the First Amendment. The Court has invoked the marketplace of ideas more than any other conception of the First Amendment, but different cases have emphasized different conceptions, and in many cases the Court has refrained from choosing among them. This is not surprising: each possible conception of the First Amendment can be subjected to legitimate criticism, and reaching agreement at that level of specificity is difficult for any group, Justices or otherwise. The Supreme Court's First Amendment jurisprudence is thus one of the many areas characterized by incompletely theorized agreements.

Benjamin, *supra* note 21 at 1677-78. As suggested above, many if not most scholars who write about the Supreme Court's First Amendment jurisprudence see "a doctrinal and scholarly cacophony."

254. *Id.* at 1678 n.13, quoting Cass Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 48 ("Many judges are minimalists; they want to say and do no more than necessary to resolve cases . . . [Minimalists] attempt to reach incompletely theorized agreements, in which the most fundamental questions are left undecided. They prefer outcomes and opinions that can attract support from people with a wide range of theoretical positions, or with uncertainty about which theoretical positions are best"). This stands in contrast to the German Constitutional Court which often reaches beyond specific fact situations to address a larger problem complexes, and does so in a way that strives for theoretical consistency. *See generally Constitutionalizing Communications, supra* note 1, at 117-150. Some see the "messiness" of U.S. speech jurisprudence as a virtue rather than a shortcoming. Widmaier, *supra* note 180, at 82 n. 31 (citing Martha Nussbaum, "who is committed to a conception of human deliberation that is 'mundane, messy, and lacking in elegance' because it deliberately sacrifices (Platonic) theoretical elegance and simplicity for the sake of (Aristotelian) 'practical wisdom.'") MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS – LUCK AND ETHICS IN GREEKTRAGEDY AND PHILOSOPHY 372 (1986).

ideas and experiences"; and (2) the micro-constitutional question of what happens when a number of individual rights collide. The macro question is addressed above in the discussion of the two competing concepts of liberty, and of the rise and fall of *Red Lion*. The micro question is discussed below.

Even if speech is understood as a personal liberty, "a right of the individual" instead of "an essential social instrument,"[255] the Supreme Court's speech jurisprudence often leaves open the question of which individual is protected, particularly in network cases. Two types of network cases provide two different results: the Internet cases, where the First Amendment focus is *not* on the network owner, but shifts ambiguously from "web publishers" and "Internet speakers" to web surfers and information recipients; and the cable cases where the network owners have succeeded (counterfactually, I argue) in establishing themselves as First Amendment speakers.

Reno v. ACLU was the first case where the Supreme Court squarely addressed issues raised by the Internet. It involved a challenge to the Communications Decency Act of 1996 (CDA), and particularly to the sections which prohibited the knowing transmission of "obscene or indecent" materials to any "recipient under 18 years of age"; it made anyone who "knowingly permits any telecommunications facility under his control" to be used for such activity, or who "uses an interactive computer service to send" materials that are "patently offensive," guilty of a crime.[256] The Court declared the CDA unconstitutional under the First

255. McGinnis, *supra* note 20, at 51.

256. Reno v. ACLU, 521 U.S. 844, 859-60 (1997) (describing provisions of 47 U.S.C. §§ 223(a) and (d)). In so doing, the Court demonstrated its failure to understand the relationship between the facilities and content layers of the Internet, saying that the "major components" of the Telecommunications Act of 1996 had "nothing to do with the Internet." *Id.* at 857. In fact, the linesharing and interconnection pieces of the Act (47 U.S.C. §§ 251-252) address the conduits and facilities that carry both telephony and IP "bits"; other parts of the Act (like section 706) directly address "advanced telecommunications services," i.e., broadband. Section 706 of the 1996 Act is codified at 47 U.S.C. § 1302, authorizing the FCC "and each state commission with jurisdiction over telecommunications services" to promote "advanced telecommunications capability," i.e., the facilities substrate on which the Internet runs. In fact, the distinction between "telecommunications services" and "advanced telecommunications capability" is largely a matter of semantics, and possibly of transmission speed and protocol - the facilities involved are often the same. A fuller discussion of this matter is largely beyond the scope of this paper, but suggests - again - the difficulty of these issues.

Amendment because it "place[d] an unacceptably heavy burden on protected speech."[257] But whose speech? And was it speaking speech or receiving speech? And if speaking speech, was it the network's speech, or the speech of content producers using the network?

The Court begins its analysis by citing the finding of the court below that "the Act would abridge significant protected speech, particularly by noncommercial speakers."[258] It then cites with approval *Ginsberg v. New York*, which recognized "the constitutional freedom of expression secured to a citizen to read or see material concerned with sex," and concludes that the Act "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[259] Nowhere are the rights of the network owners mentioned, although they presumably would be liable under the statute for the allegedly "obscene or indecent" transmissions.

The case of *United States v. American Library Association* (*ALA*) again addressed Internet indecency, but added an extra player to the cast: in addition to network owners, content providers, and network users, *ALA* addressed the rights of libraries and librarians as the providers of the terminals (and alleged public forum) where network-transmitted content was consumed.[260] At issue was the successor to the CDA, the Children's Internet Protection Act (CIPA), which conditioned the receipt of federal universal service support for Internet access on the libraries' installation of blocking or filtering technology designed to prevent children's access to pornography.[261] Among the various candidates for First Amendment protection were the libraries, the web publishers or content producers who provide the material that potentially could be obscene, and the library patrons and network users who both receive and produce content. The Court first sidestepped the libraries' claim that they had a "First Amendment right to provide the public with access to constitutionally protected speech," ruling that "when government appropriates public funds to establish a

257. Reno, 521 U.S. at 882.

258. *Id.* at 863.

259. *Id.* at 864-65, 874 (citing *inter alia* Ginsberg v. New York, 390 U.S. 629 (1968).

260. United States v. ACLU, 539 U.S. 194, 212 (2003) ("assuming again that libraries have First Amendment rights").

261. United States v. American Library Ass'n, 539 U.S. 194, 201 (2003).

program it is entitled to define the limits of that program."[262] The rights of "Web publishers" were also specifically disavowed ("public library does not acquire Internet terminals in order to create a public forum for Web publishers"), so the First Amendment nod seems to go to library patrons, although their rights are first mentioned in the concluding paragraph of the majority's opinion: "Because the libraries' use of filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the First Amendment."[263] What exactly comprised the rights of those patrons is left unexplained. Again, the rights of the network owner were left entirely unaddressed. In neither *Reno* nor *ALA* does the majority discuss *Red Lion's* affirmation of the rights of listeners and information recipients, the most salient point of that case.

In *Ashcroft v. ACLU,* addressing another legislative attempt to protect children on the Internet, the Court wrestles with whether a local or national standard applies to obscenity, opting for the greater speech protection of the latter, but does not squarely confront whose speech rights would be truncated by the former. The Court opens with a description of information recipients on the Internet ("individuals can access material about topics ranging from aardvarks to Zoroastrianism . . . [and] read thousands of newspapers published around the globe"), but then turns to "web publishers" and "Internet speakers" when it gets to the thick of its constitutional analysis.[264]

Perhaps ironically, one of the few attempts to develop a coherent taxonomy of constitutional rights in network disputes was proffered by Justice Thomas in his concurring/dissenting opinion in a cable case, *Denver Area Educational Area Television,* where he (consistent with his dismantling of *Red Lion,* above) subordinated the rights of "programmers" and "would-be viewers" to those of the

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262. *Id.* at 211 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)). Even on closer reading, it remains unclear whether the libraries are conceived as First Amendment speaker, or conduit, or censor. *See, e.g.,* American Library Association, 539 U.S. at 203 ("To determine whether libraries would violate the First Amendment by employing the filtering software . . .").

263. *American Liberty Ass'n,* 539 U.S. at 214; *see also id.* at 206 (not a public forum for web publishers).

264. Ashcroft v. ACLU, 535 U.S. 564, 566, 565 (2002) ("aardvarks to Zoroastrianism"; "Web publishers"); *see also id.* at 587 ("Internet speakers") (O'Connor, J., concurring).

cable owner:

> We implicitly recognized in Turner that the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion. Like a free-lance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no free-standing First Amendment right to have that programming transmitted. *Cf. Miami Herald v. Tornillo [supra].* Likewise, the rights of would-be viewers are derivative of the speech rights of operators and programmers. *Cf. Virginia Board, [supra].*[265]

To get to this hierarchy, however, Justice Thomas has to engage in rather substantial inductive leaps which beg the question of why speaker and viewer rights are subordinated to owner rights. This (and Justice Kennedy's more probing but less conclusive analysis noted in the margin) appear to be the only attempts from the Supreme Court or its Justices to develop a theory of how various speech rights on a network can be ranked or related to one another.

The uncertain status of speech and information recipients, and of the speech process itself, under the First Amendment may be symptomatic of a larger problem. The First Amendment posits a "freedom of speech," but First Amendment jurisprudence is often unclear about the conditions of speech in the real world, who gets to speak, and who gets silenced. Such an empirical inquiry about speech in society would depend on how speech is defined, an open issue in First Amendment jurisprudence, while more defined in the German context as described in Part IV.A above. Whatever the definition, a negative rights constitution does not concern itself with potential "horizontal" impediments to speech in society, as long as those impediments do not on their face involve "state action" (a

265. Denver Area Educ. Telecom. Consortium, Inc. v. FCC, 518 U.S. 727, 817 (Thomas J., concurring in part and dissenting in part). Ironically, the authority cited for the "derivative" rights of would-be viewers is a passage from *Virginia Board of Pharmacy,* one of the seminal information freedom cases, where the Court appeared to recognize that what is protected is not so much an individual's right as a *process*: "Freedom of Speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source, and to its recipients both." *Id.* (citing Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976)). Justice Kennedy's concurring and dissenting opinion focuses on the source of the speech, concluding that neither the public or leased access programmer's speech is the "forced speech of the operator." 518 U.S. at 788- 806.

further unresolved question of free speech jurisprudence, which gets its own section below). The empirical indifference suggested by the state action requirement is described by some as the "withdrawal of the Constitution from society."[266]

Thus we have the questions glimpsed above: Who is the speaker? Are listening and receiving data part of speech? Are there hybrid protections, combining speech and associational rights, that might cover networking and innovation on the network? Can one distinguish between speech-speaking, speech-listening, speech-information retrieval, and speech-networking?

In examining the identity of the speaker, a further level of confusion arises about the relationship of property to speech. As reflected in the analysis in the preceding section of various species of ownership-as-speech, the two are closely related, if not identical in much of the Supreme Court's First Amendment jurisprudence.[267] The confusion of property and speech in network cases stems in significant part from the cable television cases. The cable industry, led in part by the zealous advocacy of Harold Farrow,[268] established the principle that cable owners were in fact speakers. In 1979, in ruling that the FCC had no explicit authority to require public, educational and governmental (PEG) access channels on cable systems, the Court noted but declined to address the First Amendment issue.[269] In Farrow's first foray to the highest Court, the 1982 case of *Community Communications v. Boulder* (an antitrust challenge to municipal cable franchising authority), the Court again

266. Quint, *supra* note 167, at 347 ("An important underlying theme of American constitutional law is thus the withdrawal of the Constitution from society - both in its restriction of constitutional limitations to actions of the state and its exclusion of other types of constitutional provisions that might *require* the government to act in society").

267. *See generally,* McGinnis, *supra* note 20, at 87.

268. Mr. Farrow argued in four significant cable cases in the Supreme Court, often making his point that cable providers were First Amendment speakers: Community Communications v. Boulder, 455 U.S. 40 (1982); Preferred Communications v. City of Los Angeles, 476 U.S. 488 (1986); FCC v. Florida Power, 480 U.S. 245 (1987) (as attorney for amicus cable company in pole attachment case); and Leathers v. Medlock, 499 U.S. 439 (1991) (attorney for amicus cable industry group).

269. FCC v. Midwest Video, 440 U.S. 689, 709 n.19 (1979) (*Midwest II*) ("The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous"). Mr. Farrow did not participate in this case.

declined to address the First Amendment issue, while noting that the trial court had found the case presented "wider concerns, including interstate commerce . . . [and] the First Amendment rights of communicators."[270] In *Preferred Communications v. City of Los Angeles,* however, Farrow struck paydirt. The Court accepted the cable company's argument that

> The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content.[271]

The Court ruled that "the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests," because the cable system spoke "through original programming *or* by exercising editorial discretion over which stations or programs to include in its repertoire."[272] It is this phrase - "through original programming or by exercising editorial discretion" - with its slippery disjunctive, that has lived on. *Turner I* enshrined it as fact, and reiterated *Preferred's* conclusion that cable operators ""seek to communicate messages on a wide variety of topics and in a wide variety of formats."[273] On this basis, *Turner I* proclaimed (now using the conjunctive rather than the disjunctive), "Cable programmers and cable operators engage in *and* transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[274]

So we see the slow elevation of an implication to a certainty. The fact remains that cable owners are only cable speakers, i.e.,

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270. *Community Communications,* 455 U.S. at 47. While noting that the dissent at the Court of Appeals found the Boulder ordinance violated "the First Amendment rights of petitioner and its customers," the Court could avoid the issue because the "petition for certiorari did not present the First Amendment question." *Id.* at 48 n.11.

271. *Preferred Communications,* 476 U.S. at 494.

272. *Id.* (emphasis added). The Court overruled the trial court's demurrer on the "plainly implicates" rationale, and sent the case back for further proceedings. Justice Blackmun (joined by Justices Marshall and O'Connor) noted in a concurring opinion that the Court "leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities." *Id.* at 496-97.

273. *Turner I,* 512 U.S. at 636, (citing *Preferred,* 476 U.S. at 494).

274. *Id.* (citing Leathers v. Medlock, 499 U.S. 439, 444 (1991) (emphasis added)).

content producer-providers, on about 1% 2% of their channels, the so-called "local origination" channels.[275] All the rest may be understood as product on a shelf, produced by people and businesses other than the cable network owner, although *Turner I* left the impression that cable network owners were speakers for all purposes.[276] This may be traceable in part to the antecedent structural choice that had been made about cable, one that is seldom alluded to, yet remains as topical as the day it was issued. The Nixon White House declared in 1974 that cable would best be structured as a common carrier to promote programming competition and minimize government intrusion.[277] In response, the 1984 Cable Act contained an express provision prohibiting common carrier treatment of cable.[278] These are old battles, but they contribute to today's confusion.

The network owner-operators - Verizon, AT&T, Comcast among them - have seized on these many theoretical uncertainties, claiming at every opportunity that the speech they transmit is their speech or that they are "editors" of other people's speech, and thus themselves are First Amendment speakers, in a quest to gain fuller control over the speech on their networks, and greater freedom to extract revenue from the excess value created by IP transmissions.[279] For someone inured to the concept of speech as discourse, however, the current debate as to whether data bits can be considered speech, the contention of Verizon Communications in its D.C. Circuit appeal, is simply ludicrous. Equally inexplicable is how the network subscriber's speech becomes the network owner's speech, which it must be if Verizon can exercise dominion over it. From a

275. *See* 47 C.F.R. § 76.5(p) (2012) (channels "subject to the exclusive control of the cable operator").

276. *Turner I*, 512 U.S. at 637 ("our cases have permitted more intrusive regulation of broadcast speakers"); *but see id.* at 645 ("must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete"); *cf.* Tushnet, *supra* note 242, at 78. Obviously, the Comcast/NBC merger creates a heretofore unknown merging of conduit and content, raising problems of its own, beyond the scope of this paper, but the subject of a forthcoming book from Professor Crawford. SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE (Jan. 2013).

277. *See* Whitehead Report, *supra* note 241; *see also* Noam, *Towards An Integrated Communications Market: Overcoming The Local Monopoly of Cable Television*, 34 FED. COMM. L.J. 209, 217 (1982).

278. 47 U.S.C. § 541(c) (2012).

279. *See* discussion of two-sided market in note 305 *infra*.

discourse perspective, the electronic networks are places where many different speech interests meet; this perspective practically demands that that the lawmaker or jurist engage in some sort of balancing of interests.[280]

E. The State Action Problem

While the German Basic Law has been interpreted to require the legislature to protect speech from government as well as private censorship, the U.S. Constitution protects only against "state action." It is this problem that has put private censorship largely beyond the radar of our Supreme Court. "That 'Congress shall make no law . . . abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons," as the Court ruled in *CBS*.[281]

In several instances, however, the Court has discerned state action where it was not immediately apparent, cases where government regulation or enforcement was intertwined with actions found to be discriminatory or otherwise unconstitutional.[282] A badly fractured Court in *CBS v. Democratic National Committee* considered these governmental involvement cases, but could not

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280. *Cf.* Constitutional Court proclamation, *supra* note 158 and accompanying text, that electronic networks are places where many different rights meet and collide, and must be balanced. "Balancing" is another word, however, that sends shivers up the spines of conservative jurists and First Amendment absolutists. *See* discussion in note 368 *infra*. The mere fact that many different media are converging on one physical facility, without more, suggests that some sort of balancing of interests is going to be inevitable.

281. CBS v. Dem. Nat'l Comm. 412 U.S. 94, 114 (1972) (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451, 461 (1952)); *see also* Denver Area Educ. Telecom. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (reciting lower court's finding that "First Amendment prohibits only 'Congress' (and, through the Fourteenth Amendment, a State), not private individuals, from 'abridging the freedom of speech").

282. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (state action in *enforcement* of private discriminatory deed); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (state action found because of pervasive regulation of private streetcar operator, and regulatory review of action in question); Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-25 (1961) (state action in restaurant's discrimination because of close, symbiotic relationship between public authority and private business); New York Times v. Sullivan, 376 U.S. 254, 265 (1964) (state action in judicial enforcement of libel laws between private parties); Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967) (state action in statute which allowed private discrimination); Cohen v. Cowles Media, 501 U.S. 663, 668 (1991) (state action in judicial enforcement of promissory estoppels between private parties).

muster a majority either way. Only three Justices joined that part of the majority opinion finding no state action, on the grounds that government was neither a partner nor engaged in a symbiotic relationship with CBS.[283] Three other Justices (White, Brennan, Marshall) indicated that they would have found state action, Brennan and Marshall because "the reach of the First Amendment depends not upon any formalistic 'private-public' dichotomy but, rather, upon more functional considerations concerning the extent of governmental involvement in, and public character of, a particular "private" enterprise."[284] Brennan and Marshall also referenced *Red Lion's* finding that "'existing broadcasters have often attained their present position,' not as a result of free market pressures but, rather, 'because of their initial government selection. . . . the fruit of a preferred position conferred by the Government.'"[285]

The contribution of the work of Marvin Ammori and others is to show that there is state action in many places we hadn't thought to look before. Ammori rightly sees First Amendment spaces, public fora, created by government across the social landscape - the post office, government mandated common carrier systems for telephone and telegraph systems, set-asides for noncommercial, educational and informational channels for both cable and satellite transmission systems.[286] (Before him, Larry Lessig saw constitutional speech values embedded in code. After the Arab Spring, others have noted that "technology design," in particular Internet transport, "involves political strategy and is part of a nation's "constitutional moment."[287]). In the speech spaces he identifies, Ammori mentions the cable and telecommunications[288] wires that ride on pole attachments - property - which graphically

283. CBS v. Dem. Nat'l Comm., 412 U.S. 94, 119 (1972).

284. *Id.* at 172.

285. *Id.* at 175 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969)).

286. Ammori, *supra* note 21, at 42-43.

287. MACKINNON, *supra* note 141, at 53 (quoting PHILIP HOWARD, THE DIGITAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: INFORMATION TECHNOLOGY AND POLITICAL ISLAM 10 (2010) ("technology design can actually involve political strategy and be part of a nation's 'constitutional moment'")).

288. Here I am using telecommunications not in the narrow sense of some observors post-*Brand X*. The fact is that broadband is a technology that rides on many of the same wires that traditional telecommunications, as defined in 47 U.S.C. § 153, does.

illustrate that speech, even the carriers' purported speech, is dependent on the property of others, and on a system of laws that assigns, distributes and protects those rights.[289] Indeed, as the Internet runs to a very large extent on incumbent telephone lines or on coaxial cable, in ducts under public streets, through public and public utility easements,[290] or hung from poles pursuant to pole attachment statutes,[291] it becomes clear that the incumbent carriers and their cable competitors would not be sitting on top of one of the largest electronic networks in the world without substantial state action.

In his expanded catalog of state action, Ammori follows in the footsteps of others who have questioned the "negative" use of the state action doctrine to block a more proactive First Amendment interpretation. Citing the German jurisprudence of *Drittwirkung.* comparative law scholar Stephen Gardbaum argues for the sort of direct application of constitutional principles to legal disputes practiced by the German Constitutional Court: Under the Supremacy Clause, he maintains, "all law, no matter what its source or type, is subject to the Constitution."[292] Thus, he reads *New York Times v. Sullivan* to protect "the New York Times' First Amendment freedoms . . . not only where the government is directly seeking to limit the newspaper's speech but also where a private individual can achieve the same result by relying on a law permitting him or her to do so."[293] Gardbaum sees this as not much different from what the Constitutional Court did in *Lüth,* and in the subsequent *Blinkfuer* case.[294] Gardbaum's concerns are more involved with

289. Ammori, *supra* note 21, at 42 n.213 ("While cable companies object to access rules imposed on their own property, they lobby for access rules imposed on others' property. Congress grants cable companies access to the utility poles of other companies").

290. *See, e.g.,* Cal. Gov. Code § 53066; *see also* Salvaty v. Falcon Cable, 165 Cal. App. 3d 798, 805 (1985) (unregulated cable companies beyond the scope of public utility easements).

291. 47 U.S.C. § 224.

292. Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights,* 102 MICH. L. REV. 388, 418 (2003).

293. *Id.* at 434.

294. *Id.* Of *Blinkfuer,* which was also a press boycott case, but one where the Court sided with the small magazine target of the boycott called by a large publishe, Gardbaum says that the Constitutional Court held "that the [smaller target] magazine's freedom of expression was at issue and that the state had a positive duty to protect it against such coercion," which is true as far as it goes. He also notes the suggestion of a "constitutional cause of action" based on such a

general constitutional dynamics, so he misses somewhat the dynamics that drive the Constitutional Court's decisions (the Basic Law's immutable principles of human dignity and democracy as applied to communications), the Constitutional Court's concern for the *process* of self government, its interest in securing the widest possible dissemination of information and opinion, and its resulting solicitude for the "institutional freedom" of the communication media, whose protection may require legislative action:

> Opinion and press freedom protect the freedom of inquiry and the process of opinion building in a free democracy; they do not act as a guaranty of economic interests. [Rather, they] protect the institution of a free press . . The goal of press freedom is to secure and facilitate the building of public opinion, which demands the protection of the press from attempts to truncate the marketplace of opinions through the use of economic pressure.[295]

Professor Hershkoff follows up on Gardbaum's work, finding other cases and language that suggest a direct application of constitutional principles, i.e., an "American version of radiating effect," rather than walking through the state action analysis.[296] The central perception of the state action critics, according to *their* critic Lillian BeVier, is "that the actions of both state and private actors are backed by government power." She contends that the state action doctrine can be saved from its contradictions by asking who is exercising government power - government, or a private actor.[297]

None of these critics and critics of critics, however, focuses on the specific case of *the* communications network of the 21st century, which could lend their theorizing a concrete instance, in at least two respects. First, the Internet - because it runs on a physical layer, i.e., wires and other facilities belonging largely to the incumbent carriers and cable companies - could not exist without property and contract law, as well as the judicial and administrative tribunals which

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violation. *See also Constitutionalizing Communications, supra* note 1, at 125.

295. 25 BVerfGE 256 (1969) (*Blinkfüer*) (*Das Ziel der Pressefreiheit, die Bildung einer freien öffentlichen Meinung zu erleichtern und zu gewährleisten, erfordert deshalb den Schutz der Presse gegenüber Versuchen, den Wettbewerb der Meinungen durch wirtschaftliche Druckmittel auszuschalten*).

296. Helen Hershkoff, *Horizontality and the "Spooky" Doctrines of American Law*, 59 BUFF. L. REV. 455, 488-89 (2011).

297. John Harrison, Lillian BeVier, *The State Action Principle and Its Critics*, Univ. of Virginia School of Law, Public Law and Legal Theory Research Paper Series No. 2010-18, at 13, *available at* http://ssrn.com/abstract =1588082.

enforce that law, and adjudicate claims between carriers, making order out of chaos.[298] It should not be forgotten that the Internet was *all state action* at its inception, sponsored as it was by the U.S. Defense Advanced Research Projects Agency (DARPA), as a "means for researchers and defense contractors to share information."[299]

Secondly, the Internet - as a network of networks, the primary carrier of interpersonal communication, government-individual communication, and a wide range of economic activity - can itself be seen as constitutive of our social lives and body politic. If free speech is the matrix of self-government, the Internet of the 21st century is the matrix of free speech. The Germans' foregrounding of public discourse in their free speech analysis, and their attention to the *Drittwirkung* or the radiating effect of constitutional rights and values, seem to cut through the morass of "state action" analysis, and get us immediately to the matter at issue in the network cases - the speech of network users.

F. Empirical Consequences of a Negative Freedom First Amendment.

First Amendment jurisprudence posits a "marketplace of ideas."[300] But as discussed above, that jurisprudence most often describes only a "negative freedom" (i.e., one that only prevents "state action" infringing on speech). Markets can fail, however. What are the empirical consequences of a negative freedom First Amendment when idea or information markets fail, as they were found to have done in the *Associated Press v. United States* and *United States v. AT&T,* discussed above?

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298. An example of state action necessary to order the network is found in the interconnection contracts which are made under 47 U.S.C. §§ 251-252, that part of the 1996 Telecommunications Act which requires all carriers to interconnect with one another, and state agencies to arbitrate disputes that arise in the process. *See, e.g.,* Verizon v. Peevey, 462 F.3d 1150 (9th Cir. 2006); Global NAPs, Inc. v. Mass. Dep't of Telecomm. & Energy, 427 F.3d 34 (1st Cir. 2005) (ISP bound traffic).

299. *See, e.g.,* Reno v. ACLU, 529 U.S. 844, 849-50 (1997) ("what began in 1969 as a military program called 'ARPANET'"); CHRIS SHERMAN & GARY PRICE, THE INVISIBLE WEB 1 (2002). *See also* history recounted in Part II.A note 23 *supra;* Barry Leiner, Vint Cerf, Robert Kahn et al., *A Brief History of the Internet, available at* http://www.isoc.org/internet/history/brief.shtml#darpa ("A key to the rapid growth of the Internet has been the free and open access to the basic documents, especially the specifications of the protocols"); *see also* http://www.nitrd.gov/NCOSearch.aspx?SearchText=telecommunication (ongoing government research in IP/telecommunications issues).

300. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Some, like Lillian BeVier, claim that the personal autonomy unleashed by (and at the center of) negative freedom free speech will ultimately overcome any transitory market failures, and produce a broader and more diverse information landscape; others see a persistent truncation of the ideas, information and opinion available to Americans.[301]

One's degree of optimism or pessimism about the real world effects of a negative freedom model is highly correlated with one's empirical (or not) view of the level of competition in information and communication markets today. This question is highly contested. Some claim that "intermodal competition" is driving unprecedented levels of competition; others see a radical collapse of ownership diversity in the broadcasting and entertainment industries, and/or concentration in the telecommunications substrate equal to or greater than it was in 1982 when the "old" AT&T was broken up.[302] One's view of competition, in turn, depends on how one segments the information and communications market(s). If one focuses solely on the physical transport layer, on the market for telecommunications transport, one can conclude that the supposed "intermodal competitors" to the incumbent wireline carriers - wireless telephony, Voice over Internet Protocol (VoIP), cable - all remain reliant on telecommunications transport provided primarily by the incumbent carriers.[303]

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301. Comments of Lillian BeVier, *Stanford Technology Law Review* Symposium, *supra* note 88; the more pessimistic view is represented in WU, THE MASTER SWITCH, *supra* note 146; *see also* citations in note 302 *infra*.

302. As to telecommunications infrastructure, *see* John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 377 ("The Illusion of Platform Abundance"); *see also* discussion of special access proceedings in note 47, *supra*; notes 374-76 *infra* and accompanying text. As to broadcasting, *see, e.g.*, Adam Marcus, *Media Diversity and Substitutability: Problems with FCC's Diversity Index*, 3 INFO. SOC. J.L. & POLICY 83, 90 (2007) ("radio industry lost 981 owners between 1995 and 1999 . . . By 2002, four firms controlled 70% of the market share or greater in "[v]irtually every geographic market . . . [and] 66.6% of the nation's 'News' format radio listeners").

303. Thus, wireless carriers must rely on the wireline network, most crucially for the "backhaul" from the wireless cell sites and antennae to the mobile telephone switching offices located deeper in the network. Sprint and others complain bitterly about the allegedly extortionate rates charged by AT&T and Verizon for this backhaul service. *See* January 19, 2010 Comments of Sprint Nextel Corporation, *In re Special Access for Price Cap Local Exchange Carriers*, FCC WC Docket No. 05-25. The FCC has found itself unable even to gather the data that would establish who owns what wires, and allow closer consideration of the *de facto* barriers to entry, either through resale or lease of those wires, or "elements" of same, or by building

Is market concentration an inevitable result of a negative freedom" First Amendment? I would contend that there is at least a relationship between the laissez-faire approach of a "negative" First Amendment, oblivious to the connection between media ownership and opinion power, and the growth of significant market power that can restrict, divert, or amplify information flows - private censorship, in other words.

Two recent Supreme Court challenges to the incumbent carriers' alleged near-monopoly hold on key telecommunications components - *Verizon v. Law Offices of Curtis Trinko,* and *Pacific Bell Tel. Co. v. Linkline Communications Inc.* - were decided (like *Brand X*) with no reference to the First Amendment, much less a discussion of the speech rights of network users.[304] One could say that it is unfair to look for constitutional free speech claims in what were *de jure* antitrust cases involving telecommunications companies, but: (a) the *Springer/Sat1* case cited below (like the *Associated Press v. Unitd States* case discussed in Part V.A above) shows that free speech and antitrust concerns are not unrelated; and (b) the proponents of a negative First Amendment themselves make the competitiveness of the communications marketplace a lynchpin for their arguments.[305]

The relative inability of a First Amendment right of information freedom to gain traction, and its almost complete absence from telecommunications cases, creates a void that is especially problematic in the open network cases. Here the question is which requirements of traditional common carriage, on which much of the Internet was built, will continue to apply to the owners of communications transport and transmission facilities - whether traditional wires, optical fibers, or wireless spectrum - that comprise the "physical" layer of Internet transmission. [306]

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facilities-based competition. *In re Special Access for Price Cap Local Exchange Carriers,* Report & Order, FCC WC Docket No. 05-25 (August 22, 2012).

304. Indeed, consumers are completely absent in *Trinko,* and appear only in passing in the *Linkline* decision; there is no mention of the First Amendment in either decision. Verizon v. Trinko, 540 U.S. 398 (2004); Pacific Bell Tel. Co. v. Linkline Communications Inc., 555 U.S. 438, 451 (2009).

305. *See e.g.,* Yoo, *supra* note 21, at 767 ("The presence of intermodal competition between broadband access providers has led courts to hold the gatekeeper rationale articulated in *Turner I* inapplicable to the Internet").

306. *See generally* Ammori, *supra* note 21; *see also* Frieden, *supra* note 31, at 245-46; Whitt, *supra* note 34, at 590, *passim* (describing Internet "layers"); *see also* discussion of Internet's genesis on the common carrier public telephone network, in note 27 *supra.*

Because the information recipients are not in the picture, the carriers have moved into the void. In the FCC's Open Network proceedings, Verizon argued for negative freedom: "the First Amendment comes into play only when *the government* imposes restrictions affecting speech."[307] AT&T asserted that the proposed rules would "preclude[e] market actors [presumably AT&T itself] from enhancing particular messages to communicate more effectively with the public."[308] NCTA complained that the proposed rules would bar network owners' "decision-making about what content is communicated to Internet users, and how it is presented."[309]

Verizon has now carried the banner to the D.C. Circuit, mincing no words in the process: the FCC's Network Neutrality regime, as insufficient as it was in the view of many,[310] "infringes broadband network owners' constitutional rights [and] violates the First Amendment by stripping them of control over the transmission."[311] Apparently confident that the negative First Amendment will trump common sense, Verizon ups the ante: "Broadband networks are the modern day microphone by which their owners engage in First Amendment speech."[312] Verizon ignores the fact that not everyone, indeed almost no one, has this sort of microphone at his or her disposal.

The effect of these assertions, were they accepted, would be breathtaking. The network owners' view would divest 300 million Americans of sovereignty and agency in their Internet communications, leaving only a handful of fully vested First Amendment speakers in the country. At the point where Americans

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307. Verizon Comments, *supra* note 251, at 111.

308. AT&T Comments, *supra* note 250, at 16-17 ("Such rules are particularly indefensible when they implicate First Amendment concerns, as these would, by precluding market actors from enhancing particular messages to communicate more effectively with the public. The rules also would create an uncompensated taking of broadband networks in the service of dubious social objectives").

309. NCTA Comments, *supra* note 252, at 49.

310. There was a belief that the FCC, instead of issuing perhaps unenforceable rules of good behavior under Title I should instead have simply reclassified broadband as a Title II common carrier telecommunications service, and in fact the FCC opened a proceeding to do this. *See Reclassification Notice, supra* note 42, ¶ 28.

311. Verizon Brief, *supra* note 13, at 3.

312. *Id.* at 12. Oddly, Verizon later concedes that it transports the speech of "millions of individuals use the Internet to promote their own opinions and ideas and to explore those of others," but draws no consequences from this fact. *Id.* at 43.

have come to accept the Internet as their primary communications vehicle, they would be left dependent on the good graces of the few telecommunications and cable companies that own a critical mass of the physical infrastructure on which the Internet runs.

What do we know, empirically speaking, about the way the carriers are likely to behave with the control they seek? Here one can cite the familiar litany of carrier censorship: Verizon's interception and blocking of NARAL texts; AT&T's silencing of Pearl Jam's Eddie Veder as he waxed critical of President George W. Bush during a 2007 Pearl Jam concert; and Comcast's interference with the file sharing of barbershop quartet aficionados (which led to the seminal Free Press/Public Knowledge complaint against Comcast at the FCC).[313] There is also the Madison River VoIP blocking[314] and, if one reaches back further, the censorship by cable

313. These incidents are recited in Patric Verrone, *The Comcast Case and the Fight for Net Neutrality*, 34 L.A. LAWYER 9, 10 n.37 (2011). The Comcast complaint led to the FCC's *Comcast Network Management Practices Order*, 23 FCC Rcd 13028, 13055-56, ¶¶ 1, 47-48 (2008) [hereinafter *Comcast Order*] (finding Comcast guilty of a violation of open network "principles") *overturned on appeal* Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) (FCC had failed to show that enjoining a cable operator from secretly degrading its customers' lawful Internet traffic was "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities," particularly in light of the FCC's own classification of Internet access and transport as an "information service"). Realizing that it had a problem on its hands, the FCC opened a proceeding to revisit its *Cable Modem Ruling*, specifically its rejection of common carrier treatment for cable modem service because "there is no separate offering" of a telecommunications transport service, the very ruling that Justice Scalia found so questionable.) *See* note 53 *supra*. The Commission's 2010 *Reclassification Notice* proposed a "third way," whereby it would "identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service," and thereby a common carrier. *Reclassification Notice*, *supra* note 42, 25 FCC Rcd 7866 ¶ 2. Rather than do this, the FCC issued net neutrality rules in its *Open Internet Order* (*see* note 324 *infra*) and again based them on "ancillary" authority. The *Reclassification Notice* docket remains open, but there has been no decision and little action in that proceeding since the issuance of the *Open Internet Order*. Neither the D.C. Circuit's opinion in *Comcast v. FCC* nor the Commission's subsequent *Reclassification Notice* mention the First Amendment rights of network users and information recipients.

314. In the *Madison River* case, the broadband affiliate of a telephone company blocked access to VoIP services that could compete with the telephone company, and paid a $15,000 fine for doing so. *See* Madison River Communications, LLC and affiliated companies, 20 FCC Rcd 4295 (2005) *cited in Open Internet Order*, 25 FCC Rcd 17905 ¶ 35 n.104 (2010) *on appeal as* Verizon v. FCC, No. 11-1355, (D.C. Cir. 2012) The *Open Internet Order* cites other examples of blocking, slowing or degrading of nonfavored traffic. *Open Internet Order*, ¶¶ 35-36.

companies of leased and public access programming.[315]

NARAL, Pearl Jam, and the barbershop quartets are all cases on the margins, albeit symptomatic of deeper questions raised by private and non-transparent control over the physical layer on which the Internet runs. Deep packet inspection (DPI) and similar network analysis technology opens entirely new prospects of control.[316] Not only does DPI and related analytic technology make it remunerative for Google to provide consumers with free email storage in return for targeted advertising and data rights, it also made it possible for Iran to round-up and execute dissenters.[317] What the carriers appear to really want, however, is a two-sided market, which would allow them to charge content providers to reach network users (in addition to charging the users for access to the network), effectively allowing "network operators to claim a share of the value of work created by others."[318] Indeed, Verizon, at least, is quite frank about its desire to be able to discriminate between and among content, alleging that the FCC's "no blocking rule denies broadband providers discretion in deciding which traffic from so-called edge providers to carry."[319]

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315. *See, e.g.*, Altmann v. Television Signal Corp, 849 F. Supp. 1335, 1347 (N.D. Cal., 1994) (injunction issued against cable company's interference with leased and public access programming).

316. *See,* Catherine Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: the Role of the Federal Trade Commission and Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 FORDHAM L. REV. 641 (2009); *see also Deep Packet Inspection and Privacy*, EPIC.ORG, http://epic.org/privacy/dpi/.

317. The technology sold to, and then used by, Iranian mobile phone operators to crack down on protesters was publicly available software sold by Nokia-Siemens Networks. MACKINNON, *supra* note 141, at 54-56. For advertising applications, see Omer Tene & Jules Polonetsky, *To Track or "Do Not Track": Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN. J.L. SCI. & TECH. 281, 298 (2012). The author does not mean to suggest that Google has control over the physical layer, but rather that Google is using a technology that would be more problematic if aggressively exploited by formerly common carrier network operators.

318. Stefaan Verhulst, *Mapping Digital Media Net Neutrality and the Media*, OPENSOCIETYFOUNDATION.ORG, 12 n.12 and accompanying text (June 2011), http://www.soros.org/sites/default/files/mapping-digital-media-net-neutrality-20110808.pdf (summarizing arguments of Susan Crawford); *see also* Verizon Brief at 9 (FCC's neutrality rules "thus foreclose[e] a wide-range of two-sided pricing models"); Crawford, *supra* note 58, at 70 ("In a nutshell, the providers' claim is not merely that they own their networks, but also that their ownership dictates their participation in whatever profits flow from use of their broadband access points").

319. Verizon Brief *supra* note 13, at 16.

VI. Criticisms, Comparisons, Suggestions, Conclusions

A. The Affirmative Speech Model - Criticisms and Comparisons

Confronted with the affirmative German speech model (with its real world translation into a public broadcasting system sufficiently financed to compete with commercial television), the American reader can be forgiven for wondering whether a court-constructed model of communications freedom would fit into the hurly-burly of U.S. economic and cultural life.[320] Are there, nonetheless, values or concepts or strategies that the United States could productively borrow from the German communications jurisprudence? To adequately answer this question, attention must be paid to criticism of the affirmative speech model in general, and the information freedom jurisprudence in particular.

In *Constitutionalizing Communications,* I touched on some of the critiques of the German system, which at times echo the corollaries of "negative freedom" identified by Ammori: the "slippery slope" problem; distrust of government; a belief that judges should not pick winners and losers or "redistribute" speech opportunities; and, finally, the assumption that private speech is tied to property rights.[321] Each successive ruling of the Constitutional Court, and every activity of public and private broadcasters (including the structure of their operations and markets, and the content of their programs), has bred criticism from various (and sometimes all) parts of the political spectrum. I summarize these criticisms, and the response to them, from both sides of the Atlantic.

A persistent criticism is that of "model inconsistency." Although the Constitutional Court has clearly stated that there is no one model - neither a press-oriented external plurality nor the internal plurality of the public broadcasting stations - that must be realized in its pure form,[322] some see in the uneasy coexistence of

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320. Simply the fact that the German's default position is public broadcasting, while the U.S. default is commercial broadcasting, reflects these cultural differences. *See, generally,* WOLFGANG HOFFMANN-RIEM, REGULATING MEDIA: THE LICENSING AND SUPERVISION OF BROADCASTING IN SIX COUNTRIES 4, 11, *passim* (1996).

321. *See, e.g., Constitutionalizing Communications, supra* note[1, at 139-140 n.141 (citing Widmaier, *supra* note 180, at 107, 151 (German "values focus" constitutes an "elitist fallacy" and amounts to "governmentally created ethics of human interaction")); *see also* discussion at notes 85-86, *supra,* and accompanying text.

322. 83 BVerfGE 238, 315 (1991). The conservative parliamentarians had challenged the North-Rhine Westphalia broadcasting laws, *inter alia,* to the extent

public and private broadcasting two distinct constitutional approaches, and a fundamental contradiction between government's attempts to create an independent platform for speech on the one hand, and the classic understanding of speech as a liberal freedom, i.e., one directed against the state, on the other.[323] Some see a heightened incongruity in the persistence of separate constitutional regimes for the press and broadcasting, after broadcasting's "special situation" (based on frequency scarcity) is alleged to have been dissolved, and even though press and broadcasting freedoms are found side-by-side in the same clause of the Basic Law.[324] One body of thought believes that it is

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they allowed public broadcasters to engage in joint ventures with commercial entities, and separately required commercial broadcasters to observe some of the same public interest rules (diversity, balance, and so forth) that applied to public broadcasters, on the ground that such mixing of public and private forms violated the principle of "model consistency." The Court rejected this view, and put the focus not on the institutional form, but on the constitutional goal:

> The Basic Law does not prescribe any model broadcasting order, but only a goal: the freedom of the broadcasting's essential function [Freiheitlichkeit des Rundfunkwesens]. Broadcasting must be able to fulfill its task of free individual and public opinion-building. This task is independent of any model.

Id. at 316. If model consistency is not the touchstone of constitutional legitimacy, then joint public-private ventures were also not per se unconstitutional: "The Basic Law does not exclude cooperation [between public and private entities] ... a command of model consistency cannot be derived from the Basic Law ... nor can a command of strict separation between broadcasting and press." *Id.* at 305. *See also* ALBRECHT HESSE, RUNDFUNKRECHT 9-10 at ¶¶ 2:56 and 4:41 (Verlag Franz Vahlen 3d ed. 2003).

323. *See, e.g.*, Kreile, *Auf dem Prüfstand: Der Funktionsauftrag des öffentlich-rechtlichen Rundfunks in der "Digitalen Welt" [On the Test Stand: The Functional Task of Public-Law Broadcasting in the "Digital World"]*, 2002 K&R 248, 249 ("in the principle of 'structural diversification' are conflated legal-political goals of regulation and constitutional derivations. The idea of government influence on communication habits through regulation is not consistent with an understanding of constitutional freedom").

324. *See, e.g.*, VON MÜNCH, KUNIG, GRUNDGESETZ KOMMENTAR 388, ¶ 50 (4th ed., 1992) ("The systematic placement [of broadcasting freedom in Article 5] between press freedom and film freedom supports the assumption of a comparable individual right. Moreover, it is doubtful that one can distinguish between press, film and broadcasting . . . ."); Fink, *supra* note 163; 1992:19 DÖV at 806 (quoting 35 BVerfGE 202, 222 (1973) (*Lebach*) ("broadcasting freedom is not essentially distinguishable from press freedom")). Fink argues that the Constitutional Court's construction of broadcasting freedom leads to its actualization as an individual, liberal constitutional right "when the special situation, the cogency of which is increasingly reduced to its technical aspect, ends," and believes that end is in sight with the "introduction of broadband cable and satellite technology." *Id.* at 808. Many critics simply assume that in a multi-channel world of "inter-modal

theoretically inconsistent to apply different constitutional regimes to print and broadcasting.[325] This perceived lack of consistency crops up in a number of specific issues, including the extension of public broadcasters' activities into the print medium, and more recently into the online world.[326] The alleged lack of a well-founded doctrinal distinction between the press and broadcasting is echoed by American jurists who argue for a unified libertarian speech protection applied to all "speakers" - whether individuals or network owners - although we have seen the theoretical contradictions this approach engenders.[327]

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competition," there is no longer a "frequency scarcity," i.e., shortage of transmission facilities. *See, e.g.*, Degenhart, *Funktionsauftrag und "dritte Programmsäule" des öffentlich-rechtlichen Rundfunks*, 2001 K&R 329, at 335 ("a special situation based on technical or economic factors, analogous to the frequency shortage in early phases of broadcasting, is *ipso facto* to be excluded"). As noted *supra* notes 71-72 and accompanying text), it can be argued that the frequency shortage or special situation survives as long as there are individuals or groups wanting to broadcast their views but unable to do so due to technical or financial hurdles. *Constitutionalizing Communication*, *supra* note 1, at 144. A "special situation" can also be derived from the "ubiquity, immediacy, and suggestivity" of broadcasting. *Id.*

325. Widmaier, *supra* note 180, at 107, 111-14, 145-46, *passim*. He also complains that the pluralism in German public broadcasting institutions resulting from the Constitutional Court's communications freedom jurisprudence is insufficient and one-sided. *Id.*

326. *Constitutionalizing Communications*, *supra* note 1, at 173-75. The economic competition between private publisher/broadcasters and public broadcasters was in large part what animated the discussion of "model consistency" in the Sixth Decision. 83 BVerfGE 238 (1991). It seemed to the commercial publishers that they had the worst of both worlds: competition from public-law broadcasters who were now allowed into entrepreneurial and publishing activities, while they themselves were still saddled with special diversity and equal-time requirements more germane to the public broadcasting world. The German Court responded that nothing in the Basic Law prevented legislators from mixing aspects of public and private broadcasting institutions, or broadcasting and the press:

> The legislator is not required to allow only public-law or only private-law broadcasting, nor is the lawgiver required, once he has chosen a dual broadcasting system, to strictly separate the two sectors from each other . . . . The principle of "journalistic separation of powers" is not one of constitutional status. *Compare* 73 BVerfGE 118, 175 (1986). Constitutionally, the only thing that matters is that broadcasting is in a position to perform its serving function for individual and public opinion building.

83 BVerfGE at 305.

327. A classic example of a one-size-fits-all First Amendment is in the decisions and commentary supporting the application of a "newspaper" or press model to the First Amendment rights of the cable network operator. *See* discussion of *Preferred Communications*, *Midwest Video Corp.*, and Christopher Yoo's article *Beyond*

The subscribers to an affirmative free speech model counter that a "structural diversity" of speech regimes - different speech rules for press and broadcast, and (particularly in the German case) for public and private broadcasters - contributes to a diversity of information and opinion available to the public. As the American jurist Lee Bollinger puts it: "by permitting differential treatment of these institutions [press and broadcast], the Court can promote realization of the benefits of two distinct constitutional values, both of which out to be fostered," based on an "accommodation of competing First Amendment values."[328] Professor Hoffmann-Riem gives the German reading: "the combination of [public-law and private broadcasting in a dual system] promotes broadcasting freedom, in that structurally anchored possibilities compensate for the disadvantages of one system with the advantages of the other, and vice versa."[329]

The notion of structural diversification is an anathema to those who would see communications freedom as a defensive or negative right. They believe that the Constitutional Court's broadcasting jurisprudence has essentially taken a defensive constitutional right, i.e., a freedom that inheres in the individual broadcaster and is directed against the state, and - with the introduction of the "foreign" concept of a "freedom useful to third parties" - has emptied the original, liberal sense of "freedom of reporting by broadcast" of all of its content.[330] Thus we have Professor Oppermann delivering a ringing defense of "negative" liberty:

The untutored reader of the constitution may not yet have

Network Neutrality, in Part V.C and V.D , *supra*.

328. Widmaeir, *supra* note 180, at 147 n.383 and accompanying text (quoting LEE BOLLINGER, IMAGES OF A FREE PRESS 116 (1991)). Widmaier ultimately concludes that there are no workable distinctions between the media for First Amendment purposes. *Id.* at 148.

329. WOLFGANG HOFFMANN-RIEM, REGULIERUNG DER DUALEN RUNDFUNKORDNUNG, [REGULATION OF THE DUAL BROADCASTING SYSTEM] 68-69, 315 (2000). Hoffmann-Riem half concedes, however, that such a theory of mixed constitutional regimes is essentially putting the best possible face on an economically inevitable situation: "it is doubted that the dual system has led to an [overall] improvement of the broadcast order." *Id.* at 69 n.231 (citing HESSE, *supra* note 30, at 213 ("if one looks however at the journalistic and substantive quality as the decisive criteria, then the dual system can hardly be said to have led to an improvement in the [total] broadcast offering [available when broadcasting was a public monopoly]").

330. *Cf.* Fink, *supra* note 163, at 807-08 ("the idea of a [constitutional] freedom useful to third parties through implementation by regular law is foreign to a liberal constitutional understanding").

> discovered why the actual basic speech rights of sentence 1 [Article 5's individual freedom of expression] do not have at least equal status and normative power in the realm of electronic media. So we come to the Constitutional Court's demand for the institution of broadcasting freedom based on a "positive order with material, organizational and procedural safeguards," behind which the *status libertatis* of the natural constitutional proponent of Article 5 must retreat.[331]

On this view, the notion that broadcasting freedom "serves" the interests of democratic self-governance is nothing more than an invention of the judges who sit on the Constitutional Court:

> It has yet to be successfully shown, that the constitution is built on any specific canon of values, be they the cultural inheritance of Europe, the ideas of Christian morals and ethics, or the modern accomplishments of a western-oriented, enlightened society, or whatever frame of orientation one might choose . . . [B]ecause of the diversity of partially contradictory conceptions, a legal order which pretends to be generally applicable will have difficulty following a specific natural law model.[332]

Such critics find a "free and uncensored press, not steered by government authority, to be the essential element of a free state . . . and ineluctable for the modern democracy."[333] Their most trenchant criticism of the affirmative speech model is that it might pretend to be values-neutral, but is in fact implementing substantive values. Some of these criticisms are restated in the American vernacular by a German lawyer practicing in the United States, who complains that German jurisprudence and the public television it makes possible are not, in fact, values neutral, but rather cover a barely hidden cultural elitism.[334] He also claims to find significant,

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331. Thomas Oppermann, *Rundfunkgebuehr - Rundfunkordnung - Rundfunkideologie, Zum Rundfunkgebuehrenurteil des BverfG vom 22.2.1994*, 1994 JZ 499, 500.

332. Fink, *supra* note 163, at 811 (arguing that the jurisprudence of the Constitutional Court in the final analysis relies on the "personal conceptions of the judges"); *compare* BeVier, *supra* note 49, at 1315-16 ("all nine of the Justices would make their own subjective determination"). *See also* discussion in *Constitutionalizing Communications*, *supra* note 1, at part III(C), regarding institutional freedom and objective rights.

333. *Id.* at 807.

334. Widmaier claims to find significant, opinion-building content in what others see as the "vast wasteland" of commercial broadcasting. Widmaier, *supra* note 180, at 158 (finding useful content in *The Simpsons* and *Married with Children*). *See* also *id.* at 152 n.402, discussing Newton Minnow's famous dismissal of U.S.

opinion-building content in what others see as the "vast wasteland" of commercial broadcasting.[335] Some critics go deeper, objecting that the German Basic Law's system of objective values, as enunciated in *Lüth* and subsequent cases, "allows the [Constitutional] [C]ourt to engage in open-ended decision making while appearing to be text-bound."[336]

On the other hand, it can be argued that the German constitution's core values of human dignity and democracy are not elitist, that the interpretation of a democratic constitution is always somewhat open-ended, and that the lack of such values can lead to efforts to "obstruct modernity" and protect entrenched private-market relationships.[337]

Some see the U.S. and German constitutions as fundamentally different, although human rights and democracy are heralded as signature values in both countries. Moreover, Professor Jackson notes a long tradition of considering foreign and international law in the development of U.S. law.[338] Constitutional law can mature in the same way that common law matures, and the current absence of an affirmative speech tradition may be seen more as a point on a trajectory than a settled reality.[339] Critics of this view claim in effect

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television as a wasteland: "The most aggressive and least helpful denouncement of television that I have encountered is that by President Kennedy's chairman of the FCC, Newton N. Minow. Minow, in a 1961 address to the National Association of Broadcasters, expressed his deep-seated disdain for television by stating:

> [Television is] a vast wasteland. You will see a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western badmen, western good men, private eyes, gangsters, more violence, and cartoons. And endlessly, commercials - many screaming, cajoling, and offending. And most of all, boredom."

Id., quoting Newton N. Minow, Address to National Association of Broadcasters (1961), *quoted in* JONATHAN W. EMORD., FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 198 (1991).

335. Widmaier, *supra* note 180, at 158.

336. *As reported in* KOMMERS, *supra* note 4, at 47.

337. *See* Vicki Jackson, *Constitutional Law and Transnational Comparisons: the Youngstown Decision and American Exceptionalism*, 30 HARV. J.L. & PUB. POL'Y 191, 191 (2006) (quoting Justice Scalia's "position that constitutions are 'designed to obstruct modernity,'" in *Modernity and the Constitution, in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 15. (Eivind Smith ed., 1995)).

338. Jackson, *supra* note 337, at 192 n.6 and accompanying text.

339. Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*? 14 U. of Chicago, Public Law Working Paper No. 36 (January 2003), *available at* http://ssrn.com/abstract=375622, ("The realist explanation ...

that the choice was made long ago, that the U.S. Constitution expresses a culture where speech is rooted in personal autonomy and a private sphere, a view antithetical to a "world of 'undeviating organization'" that (critics worry) could result from the "collectivist" argument that free speech must be "managed" to the benefit of democracy.[340]

Some of this criticism can be explained in practical terms by what the Germans refer to as the distinction between internal pluralism and external pluralism, diversity as found on one network or platform versus diversity across many networks, programs, and platforms.[341] In the former, access mechanisms like a right of reply or a fairness doctrine, if not a common carrier or functional separation model, might obtain; the latter is dependent on a robust marketplace. The negative First Amendment theorists reject any attempt to inject pluralism into an individual publication (*Tornillo*), or broadcast station (*Red Lion*), or network platform (common carriage or separation), believing instead that diversity of opinion and information is best served by the "external pluralism" of the marketplace, or - in the event of marketplace failure - by attempts to secure a diverse and pluralistic marketplace at a sub-constitutional level, through antitrust rules and ownership limits, for example.[342]

As suggested above, what view one espouses on the question of affirmative vs. negative rights, internal vs. external pluralism, may well depend on one's view of the marketplace. The German critics more inclined to the external pluralism point of view argue that the goals of liberal democracy are best reached under the conditions of entrepreneurial freedom, i.e., in a "state free space" where (they assert) neither content nor values are predetermined.[343] Only in this way can "individual development, the protected area of every basic

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emphasizes that American constitutional law is, to a considerable degree, a form of common law, based on analogical reasoning").

340. Tushnet, *supra* note 93, at 1275-76 n.237-50 and accompanying text; *see also* Post, *supra* note 20, at 1136 ("State intervention, however, implies managerial control, and we ought not to be quite so quick to embrace a world of 'undeviating organization' (as members of the Frankfurt school would characterize it)") (quoting MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 87 (John Cumming trans., 1972)).

341. *See, e.g., Constitutionalizing Communications, supra* note 1, at 21 n.21, 158 n.225, 186 n.329 and accompanying text.

342. *See West German Television Law, supra* note 1, at 158.

343. Fink, *supra* note 163, at 807, 812.

right, remain free from governmental regimentation."[344]

Democratic speech theorists counter that such state-free spaces are an illusion, at least for the complex electronic networks of today, in that such networks require state property laws, judicial enforcement and regulatory structure to exist, not to mention the legislatively mandated use of public and private rights of way.[345] Moreover, as argued in the next section, the case against an affirmative speech model depends (by definition) on the belief that private censorship is not a problem, that significant "opinion power" does not result from the concentrated ownership of the underlying facilities, or that such concentrated ownership does not in fact exist.[346]

B. Possible Ways Forward

The fundamental question posed by this article, by the current appeal of FCC network neutrality (or "open network") rules, and by a myriad of other information-related issues referenced at the outset,[347] is whether the Supreme Court is going to concern itself in a practical or empirical way with the amount and scope of information and opinion available to the public. And should the Court find the public's access to information and opinion

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344. *Id.* at 812.

345. Broadcasters, cable operators, telephone companies, and other network operators need courts to enforce contract and property rights, regulatory agencies to manage spectrum, and legislation to authorize their use of streets and public rights of way. *See, e.g.*, Ammori, *supra* note 21, at 27 (telephone access rules), 42 (pole attachments), 51 ("public rights of way at no charge"); *see also* SUNSTEIN, *supra* note 8, at 40 ("government licenses television channels, and it confers rights of exclusion") and 45 ("broadcasters are given property rights in their licenses by government, and their exercise of those rights is a function of law"); Cal. Gov. Code § 53066 (granting cable networks rights in public utility easements).

The second response to the libertarians is that they ignore the potential for private market forces, as much as authoritarian governments, to (1) undermine and limit such "autonomous self determination," and (which is another way of saying the same thing) (2) negate any indeterminacy of values. In other words, the market brings with it its own set of values and limitations on what is conceivable in the public opinion-building process. *See* Part III.E *supra.*

346. *See generally,* Yoo, *supra* note 22, at 702, 733 ("Court has long held that the fact that an intermediary may wield monopoly power and the danger that intermediaries may act as private censors do not justify regulating their editorial discretion" because "the remedy for any private censorship ... is more speech, not regulation . . [except] when the opportunities to speak are limited" (citing *CBS v. Democratic National Committee, Tornillo,* and several other cases discussed *supra*).

347 *See* notes 7-9, *supra,* and accompanying text.

threatened, will it step in and use the law of information freedom, developed in *Red Lion, Virginia Board of Pharmacy,* and related cases, to protect and maximize the public's access to a diversity of ideas and a fullness of information?

There are numerous reasons for doing so. Whether one subscribes to the philosophy of Friedrich Hayek, Karl Popper, John Rawls, or Jürgen Habermas, to take a sample of prominent 20th Century thinkers about democracy, information is the coin of the realm. There is little quarrel with the proposition that the quality of public decisionmaking is improved by more information and better access to the broadest range of opinion. Hayek, Prof. John McGinnis suggests, would have seen the Internet as "an example of spontaneous order arising from the decisions of thousands of individuals and corporations without the central direction of the state" (and, at least to date, without the central direction of of the network operators).[348] Hayek might have immediately recognized how the Internet allows an individual or decision-making body to "obtain dispersed information . . . the 'dispersed bits of incomplete and frequently contradictory knowledge.'"[349] Similarly, Popper's notion of an "Open Society" turns on the importance of free information flow in "preventing bad governments from doing bad things."[350] From a Rawlsian viewpoint, the Internet provides "a forum that enables the participation of all, and not [just] a closed community in which rules of seniority, aristocracy and exclusivity may apply."[351] The Habermas perspective of an ongoing, self-legitimating democratic process is described above. Despite their

348. McGinnis, *supra* note 20, at 100 n.210 and accompanying text (citing F.A. Hayek, *The Fatal Conceit: The Errors of Socialism in* 1 THE COLLECTED WORKS OF F.A. HAYEK 3, 6, 83-84 (W.W. Bartley, III ed. 1988).

349. SUNSTEIN, *supra* note 145, at 118 ("[t]hroughout his life, Hayek was concerned with how to obtain dispersed information . . . He emphasizes the unshared nature of information, the 'dispersed bits of incomplete and frequently contradictory knowledge'").

350. Frederick Schauer, *Transparency in Three Dimensions,* 11 U. ILL. L. REV. 1339 n.79 (2011) (citing KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (5th ed. 1966)). *See* OPEN SOCIETY, Book 1, at 200 ("Once we begin to rely upon our reason, and to use our powers of criticism, once we feel ... the responsibility of helping to advance knowledge, we cannot return to a state of implicit submission to tribal magic").

351. Schejter & Yemini, *supra* note 143, at 171. Because "everyone is potentially a speaker" on the Internet, nondiscrimination rules would seem to best approximate the choices that would be made from the "original position," where every participant in the social discussion "must participate [in the framing discussion] unaware of their own circumstances." *Id.* at 144-145, 171.

fundamental differences, *all* of these philosophical/social programs would be damaged by allowing a handful of network owners to be the last word on what information is most readily available to citizens.

The German constitutional jurisprudence, and the institutions it has spawned, teach us that it is possible to create independent, neutral, self-executing, and "diversity-generating" *structures* to guard against public or private censorship, and that these *structures* have a constitutional dimension.[352] The focus on structure avoids individual determinations about content that are constitutionally problematic, and invite litigation and delay.[353] A focus on structure (or First Amendment "architecture") also avoids the "world of 'undeviating organization'" that haunts critics of the affirmative model. A program for information freedom in the United States, then, could embrace structures that are content-neutral, self-executing by nature, and do not require case-by-case enforcement.

Many such structures suggest themselves; this article's focus is on one of them, a robust and open Internet. The Internet is a miracle bequeathed to the world by the chance conjunction of a government funded research network[354] and a group of nonconformist engineers who developed the code and protocols to enable a worldwide converged network capable of carrying all digitally expressible information.[355] It is also *the* concrete test case of U.S. free speech jurisprudence in the 21st century, and its adequacy to protect this "voice for the many" and "first true technology of abundance."[356] Professor Lessig draws the connection between structure and

352. Wolfgang Hoffmann-Riem, *Von der dualen Rundfunkordnung zur dienstespezifisch diviersifizierten Informationsordnung - Einführung*, in VON DER DUALEN RUNDFUNKORDNUNG ZUR DIENSTSPEZIFISCH DIVERSIFIZIERTEN INFORMATIONSORDNUNG 1, 17 (Kopps, Schulz Held, eds. 2001) ("It is a rule of thumb, that facilities and support for diversity-generating structures are preferable to regulation of specific communication content").

353. Regulations that address content - for example, Fairness Doctrine issues relating to whether a broadcaster has covered all issues of importance and given fair treatment to all sides of those issues inevitably draws the oversight agency into content adjudications - trigger the highest level of constitutional protection, and strict scrutiny on review, as opposed to content-neutral regulations which receive less scrutiny. *Turner I*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

354. Reno v. ACLU, 521 U.S. 844, 850 (1997) (discussing ARPANET).

355. *See generally* MARKOFF, *supra* note 7, at 165-66, 201, 206.

356. Schejter & Yemini, *supra* note 143, at 173.

speech:

> The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. This model has implications far beyond e-mail and web pages. Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means. [357]

What has made the Internet the many-to-many communications wonder it is today has been its "end-to-end" principle, the fact that it is "dumb in the middle," with its intelligence at the edges, which allows innovation by anyone who would "only connect."[358] Here, the contrast is between the common carrier model, where the conduit transports all content without discrimination,[359] and the vertically integrated carrier where the network owner is also a content provider, or where the network owner otherwise combines its basic transport function with the sale of content or services, and can discriminate at will between such services.[360] In the latter case, we can surmise that control of the "medium" or network (to use the German vocabulary) leads to control of other "factors" or inputs in the public opinion-building process.[361]

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357. LESSIG, *supra* note 45, at 167.

358. The reference here is to Kevin Werbach's *Only Connect,* 22 BERK. TECH. L.J. 1233, 1266 (2007) ("content and application providers at the edges of the internet [are] essentially becoming network operators themselves"); *see also* Werbach, *The Digital Broadband Migration: Rewriting the Telecommunications Act: Communications Law Reform: Breaking the Ice: Rethinking Telecommunications Law for the Digital Age,* 4 J. ON TELECOMM. & HIGH TECH. L. 59, 62 (2005) ("Intelligence moves to the edges of the network"); LawrenceLessig, *Reply: Re-Marking the Progress in Frischmann,* 89 MINN. L. REV. 1031, 1040 (2005) (" the Internet was born with an end-to-end architecture. That architecture shifts intelligence in this network to the ends, or edge, so far as that is possible, and seeks to keep the network itself as simple as possible. The end-to-end architecture was - at least at the terminating ends - in fact the architecture of the common-carrier telephone company distribution systems. *See also* Werbach, *supra* at 76 ("The argument was that the open platform model used for the phone network had been the foundation for the Internet's spectacular growth").

359. 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage").

360. The cable television provider is the paradigm here. *See* discussion of *Preferred* and *Midwest Video* cases in note 241, *supra.*

361. *See Constitutionalizing Communications, supra* note 1, at 171 n.270, 189 n.344

The "layered" nature of "next generation networks," allows many different information-laden applications - telephony, email, websites, search engines, radio and video transmission among them - to ride on a common transport or network layer;[362] this accentuates the conflict-of-interest associated with allowing quasi-monopoly network operators to market applications, services and content competing with third-party applications, services and content on those networks.[363] Similar concerns have led to a negotiated "functional separation" between British Telecom and its underlying transport subsidiary, "open reach,"[364] and to a recent

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and accompanying text ("medium and factor"); 135 n.125, 136 n.129, 177 n.297 and accompanying text (transfer function of communications medium); *see also* Whitt, *supra* note 34 and accompanying text (control over the physical layer enables control over higher protocol layers).

362. *See* discussion in Part II.A *supra*.

363. These dangers are contested. Opponents of network neutrality claim there is little if any reason or evidentiary record to substantiate fear of abuses by network operators. *See, e.g.*, William Rahm, *Watching over the Web: A Substantive Equality Regime for Broadband Applications*, 24 YALE J. ON REG. 1, 34 (2007) ("Advocates of a market-based solution contend that there are no demonstrated harms"). History, economics, and operational realities - not to mention Verizon's recent filings in the net neutrality appeal - all provide reason for concern. *See also supra*, Part V.D. AT&T and other monopoly or quasi-monopoly telecommunications providers have a long, documented history of leveraging their incumbent status for profit-maximization rather than customer service, and indeed under United States corporate law may be required to do so. *See, e.g.*, Universal Service and Intercarrier Compensation, 24 FCC Rcd 647 (Nov. 5, 2008), Appendix A (Chairman's Proposal), ¶¶ 160-168 n.390-96 and accompanying text, detailing AT&T's historical anticompetitive conduct (refusal to interconnect in order to drive independent telephone companies out of business). Economics underscores the history. *See, e.g.*, van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 329, 342-68 (2007) (economic incentives for network owners to exploit control of the conduit).

364. In 2002, the British Parliament passed a Communications Act creating the Office of Communications (Ofcom), and in 2003 passed another Communications Act authorizing Ofcom to enforce provisions of the Enterprise [antitrust] Act, and to police anticompetitive conduct or situations in the communications markets. *See 2003* Act, § 369 *et seq.*, *available at* http://www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1. This legal authority resulted in a settlement between Ofcom and British Telecom in 2005, "Undertakings given to Ofcom by BT pursuant to Enterprise Act 2002," current version *found at* http://www.stake holders.ofcom.org.uk/binaries/telecoms/policy/bt/consolidated.pdf. This essentially required BT to do two things: (1) establish a separate "ring-fenced" business entity or subsidiary to offer bottleneck services, including last mile loops and Ethernet backhaul; and (2) to offer such wholesale bottleneck services to BT subsidiaries and third party competitors on an equal basis. The separate subsidiary was named openreach. *See* http://www.openreach.co.uk. Ofcom reports that this separation has led to a reduction in price and an increase in penetration for broadband

directive of the European Parliament allowing member countries to separate the transport layer from the applications layer of the network (as the British did), meaning the transport layer operates effectively as a common carrier.[365]

If information and communications freedom mean anything in the digital age, they require securing the neutral operation of the transport layer in order to protect this new "model of free speech." This separation was the law of the land when the FCC issued its *Computer II* decision, prohibiting the incumbent carriers from directly owning information (or "enhanced") services which used the network (again with no discussion of First Amendment issues).[366] An analogous separation of content and conduit has been

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services. *See* presentation of Ofcom's Tom Kiedrowski, *Functional Separation: the UK Experience, at* http://www.wik.org/fileadmin/Konferenzbeitraege/2008/Review_of_the_European_Framework/11_Kidrowski__Tom_-__0408.pdf (April 2008) and http://www.eett.gr/conference2008/pdf/Kiedrowski.pdf (June 2008).

365. On November 25, 2009, the European Parliament adopted Directive 2009/140/EC which amended the EC's Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on Access to, and Interconnection of, Electronic Communications Networks and Services, and 2002/20/EC on the Authorization of Electronic Communications Networks and Services, by adding a new Article 13a to the Access Directive, providing in relevant part:

> Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, in accordance with the provisions of the second subparagraph of Article 8(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.
>
> That business unit shall supply access products and services to all undertakings, including other business units within the parent company, on the same timescales, terms and conditions, including with regard to price and service levels, and by means of the same systems and processes.

The document is currently available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:01:EN:HTML; *cf.* common carrier duty of non-discrimination under U.S. law, 47 U.S.C. § 202.

366. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 2d 384 (1980) [hereinafter Computer II], *modified on reconsideration*, 84 FCC 2d 50 (1980) [hereinafter Reconsideration Order], *further modified on reconsideration*, 88 FCC 2d 512 (1981) [hereinafter Further Reconsideration Order], *aff'd sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984). The clear distinctions of *Computer II's* "structural separation" began to collapse with the FCC's issuance of

the working assumption of the Constitutional Court's broadcasting jurisprudence from its inception.[367] This separation reflects a *balancing* of competing speech interests, in which the scales tip heavily in favor of the speech interests of the millions of network users rather the handful of network owners.[368] To protect a democratically constitutive plurality of voices, opinions, and information on next generation networks, lawmakers on both sides of the Atlantic will need the political will to maintain a transport system with "open and standardized interfaces."[369] This is where

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Computer III in 1986, and disappeared entirely when the FCC decided in its *Cable Modem* Ruling that it could no longer distinguish between transport and enhanced or information services. Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) 104 FCC 2d 958 (1986) [commonly known as Computer III]; *see also Cable Modem Ruling, supra* note 12.

367. As described above, the Constitutional Court has posited from its First Decision forward a separation between the editorial function of broadcasting and the transmission facilities that made that function possible. *Constitutionalizing Communication, supra* note 1, at 109-10. In this regard, the German Court was prescient in emphasizing the neutrality of the conduit, necessary to broadcasting's "transfer function" in social discourse. *Id.* at 135-37 n.125-29, 177 n.297 and accompanying text (discussing broadcasting's *Vermittlungsfunktion*). In its later Decisions, the Court extended the reach of Article 5 broadcasting freedom to frequency allocation, cable retransmission and must-carry rules, again assigning the transmission facilities a *serving* function in the constitutional hierarchy). *See id.* at Parts III(K)(3)(c) and (d). It is largely as a result of the market liberalization driven by the EC that the serving function of the transmission facilities has been called into question. *Id.* at 195.

368. The word "balancing" is a loaded term in First Amendment jurisprudence, implicating the old debate among First Amendment "absolutists" and "relativists." *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) ("I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field") (Black, J., dissenting); Patricia Stembridge, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907, 911-19 (2000) (describing the different strains of absolutism of Justice Black and Prof. Meikeljohn, and noting that "the Supreme Court has never accepted the absolutist position"). Many of the classic "balancing" cases pitted First Amendment "rights" against other interests, whereas with the evolution of First Amendment law and electronic networks the Court is now more prone to see "important First Amendment interests on both sides of the equation." *Turner II*, 520 U.S. 180, 227 (1996) (Breyer, J. concurring) (finding that must-carry statute at issue "strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences").

369. ERG Consultation Document, *supra* note 35, at 96-97. The argument to be made against this is essentially the same argument made by cable companies in Germany and United States against retransmission requirements, and more recently even by telephone companies with regard to common carrier obligations: the imposition of public interest duties infringes on the economic (or speech) rights of the underlying network owners. *See Constitutionalizing Communications, supra*

common carrier and constitutional (First Amendment or Article 5) interests meet. The constitutionalization of the communication infrastructure, or at least its transport layer, is the first condition of speech in the 21st century.[370]

As suggested above, concerns about slippery slope and government *hauteur* (if not censorship) are addressed by tying First Amendment speech protections to content-neutral structures. It is difficult to imagine a more content-neutral structure than common carriage telecommunications, which is the essence of the network neutrality proposal, although some (like Professor Tribe, quoted above) persist in seeing the choice of a common carrier transport system as favoring one sort of speech over another.[371] Government can operate in a content-neutral way to separate conduit from content; such a separations principle has been a recurrent feature of telecommunications law. A common carrier regime has never been successfully challenged on First Amendment grounds.[372]

Those who would oppose any attempt to impose "common-carrier lite" nondiscrimination requirements on the network operators, as in the pending Verizon appeal, invariably base their opposition on a belief that the market is self-executing, and any

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note 1, at sections III(K)(3)(c), III(K)(3)(d). *Cf.* Part IV.D *supra.*

370. It may sound somewhat hyperbolic to predict the end of communications freedom unless transmission systems are secured for public purposes, but the privatization of the German communications and broadcasting infrastructure has already compromised broadcasting freedom, as described in *Constitutionalizing Communications, supra* note 1, at section III.K.

Separation of transport and service/content layers of the Internet is by no means a new suggestion. *See, e.g.*, Computer II, *supra* note 366; Justin Brown, *Fostering the Public's End-to-End: A Policy Initiative for Separating Broadband Transport from Content,* 8 COMM. L. & POLICY 145, 186 (2003) (pre-*Brand X*, pre-NGN article discussing transport/content separation, as well as carriers' "First Amendment challenges to common carrier obligations"); Crawford, *supra* note 58, at 86-87 (suggesting "wholesale separation regime for telecommunications providers ... [b]ecause 'unbundling' has proven not to work in the United States . . . [and] 'quarantine' will be needed").

371. The content-neutrality at the root of net neutrality is reflected in the diverse groups of supporters that it attracts - from the NRA to the ACLU, from NARAL to the Christian Coalition. *See, e.g.*, Statement of Michele Combs, The Christian Coalition of America, GN Docket No. 09-191, at 5 (filed Dec. 22, 2009) (explaining why Christian Coalition and NARAL both support net neutrality), *cited at* FCC's Open Internet *Order, supra* note 319, at 6 n.232.

372. *See* discussion in WU, *supra* note 146, at Chapter 21 ("The Separations Principle"); *but see* Comcast v. Broward Cnty, 124 F. Supp. 2d 685 (D. Fl., 2000) (cable company's transport of broadband traffic akin to distribution of circulars, no mention of network users' rights).

government intervention will lead to less competition and therefore less choice among information options, not more.[373] This is a subject which has been extensively discussed in the scholarly literature (not to mention FCC and court decisions), some of which is referenced above, but on which I will offer one further observation. As noted above, the market optimists typically build their argument, for a healthy marketplace and against non-discrimination rules, on the perception of "inter-modal" competition, a world where cable, VoIP, wireless, and plain old fashioned telephone service all compete with one another; the reality, however, is that all of these services use the same wired inputs, and those wires are owned overwhelmingly by AT&T and Verizon.[374] At least we think they are. The FCC has been attempting for *over ten years* to gather information on competition, or the lack thereof, in the crucial "middle-mile" and/or "special access" markets, with little success, and little urgency.[375] These are

373. *See, e.g.*, Yoo, *supra* note 305, at 767. There was, however, an explosion of competition *after* the intervention by the British Government (Ofcom) to separate content from service layers of the network. *See* Kiedrowski, *supra* note 364, at 15.

374. *See* notes 302-305 *supra*, and accompanying text. For the market optimist position, *see also* Adam Thierer, *Are "Dumb Pipe" Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model*, 3 J. ON TELECOMM & HIGH TECH L. 275, 301 (2005) ("the current broadband marketplace is growing increasingly competitive with each passing month. The picture will only get rosier as wireless alternatives become more ubiquitous and other wireline providers (especially electric utility companies) start jumping into the broadband market"); *compare* Blevins, *supra* note 302, at 378 ("Adam Thierer writes, 'it is now possible to consume the same piece of content via a broadcast TV or radio station, a cable channel, a satellite system, on a DVD player, on a cell phone or other mobile media device, on a portable gaming system, or over the Internet.' Interestingly, however, many of these seemingly abundant platforms - the cell phone, the gaming system, the mobile media device, the Internet, and even broadcast and cable content - all increasingly rely *on the same broadband access infrastructure* as a shared foundational input. Even though these scholars are aware of the Internet's layered structure, the emphasis on cross-platform substitutability and convergence implies an equality between the application and network layers that does not exist.") (emphasis added); *see also* Qwest Corporation, 25 FCC Rcd 8622 (2010), ¶¶ 33-34 (the "predictive judgments" of coming facilities-based competition, made earlier to address "theoretical and empirical concerns associated with duopoly" communications services in the Qwest service area - Qwest and its cable competitors - "have not been borne out by subsequent developments").

375. *See* Special Access for Price Cap Local Exchange Carriers, FCC WC Docket No. 05-25 (August 22, 2012), ¶¶ 7, 14 (noting 2002 petition for rulemaking to revoke pricing flexibility rules, and announcing an intention to issue a data request *in the future*). As set forth in note 51 *supra*, the competitive carriers had filed a writ of mandamus asking the D.C. Circuit *to compel* the FCC to investigate and act on this crucial issue. The writ was withdrawn when FCC apparently promised to move the proceeding along.

key inputs. We know the last mile is in most places a duopoly, with cable predicted to emerge as the ultimate winner because of its higher capacity wires. Long-haul or backbone capacity is generally assumed to be a more competitive market. It is the "middle mile" or special access market - lines needed for backhaul from every cell tower into the network, to connect every VoIP provider to a central office, to allow CLECs to reach their customers, and take traffic from cable head-end into the network - which is emerging as ever more crucial, and the subject of increasing complaints about its control by the incumbents (which also control roughly half of the last-mile market, and substantial portions of the backbone market).[376]

A constitutional mandate of information freedom, applied either directly or through the prism of state action, could (as it did in the *Associated Press* case, *supra*) also reframe or reinforce the antitrust analysis as applied to information markets. In *Springer/Sat1,* both the German Cartel Office and the Commission on Competition in the Media (KEK) rejected the proposed acquisition of Germany's second-largest private broadcaster, ProSiebenSat.1 Media AG, by its largest newspaper and magazine publisher, Springer Press. The KEK rooted its decision in constitutional grounds which superceded a purely numbers-based approach to the proposed merger:

> With the factual standard of "dominant opinion power," [the applicable section] of the Inter-State [Broadcasting] Treaty refers back to a . . . constitutional command of opinion diversity in the media. This in turn rests on the special importance of broadcasting as medium and factor in the process of individual and public opinion-building, which is ineluctable [*unverzichtbar*] for the development of the individual personality and the securing of a free democracy . . . . [I]n the total offering of commercial programs at least a substantial part of all social groups and ideologies must have the actual chance to speak, so that a marketplace of ideas is created . . . . [This mandate also includes] the prevention of one-sided, or in large measure unbalanced, influence of individual producers or programs on the development of public opinion, in other words the deterrence of

376. *See, e.g.,* July 8, 2011 public hearing in California Public Utilities Commission proceeding I.11-06-009 *Investigation of Planned Purchase by AT&T of T-Mobile,* transcript at pp. 87 (Sprint assertion that "90-plus percent of our special access [backhaul] is with the ILECs"); *see also id.* at 93-94; *cf.* www.nochokepoints.org.

dominant opinion power.[377]

By contrast, when cross-ownership limits promulgated by the FCC were recently challenged in the D.C. Circuit, the interests of information recipients made a fleeting appearance (FCC rules "are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity"), but those interests were not explicitly elevated to constitutional status, while the broadcasters' and publishers' claimed (negative) First Amendment right to be free of any ownership limits and to aggregate themselves into ever larger units assumed center stage.[378]

VII. Conclusion

Digital convergence and IP technology, and the growing realization and reality that the world is becoming connected to and by one network, has created the most profound "structural transformation of the public sphere" in history.[379] And it may be more than the public sphere that is changing; a rearranged cognitive infrastructure may also change the way we think.[380] The question is whether, on a meta-level, it is possible to make choices about how our thinking will be changed. How well can we, as a matter of policy and politics, think about thinking? How does the information explosion reframe questions of identity, liberty, equality, and democracy?[381]

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377. Beteiligunsveränderungen bei Tochtergesellschaften der ProSiebenSat.1 Media AG [KEK] Mar. 30, 2007, No. KEK 293-1 bis-5 (F.R.G.), *available at* http://www.kek-online.de/kek/verfahren/kek293prosieben-sat1.pdf; *see generally Constitutionalizing Communications, supra,* note 1, at 170-73.

378. Prometheus Radio Project v. FCC, 652 F.3d 431, 464-65 (D.C. Cir. 2010) (citing FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 796, 799-800 (1978)).

379. The reference is to JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Burger trans., 1989) (original German is STRUKTURWANDEL DER ÖFFENTLICHKEIT) (1962).

380. I am borrowing the phrase "cognitive infrastructure" from Karl-Heinz Ladeur, and his article on cognitive infrastructure and public decisionmaking. Ladeur, *The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making,* 14 IND. J. GLOBAL LEG. STUD. 329, 330 (2007).

381. *See, e.g.,* Robert Boynton, *Enjoy Your Zizek! An Excitable Slovenian Philosopher Examines The Obscene Practices Of Everyday Life - Including His Own,* 8:7 LINGUA FRANCA (October 1998), *available at* http://linguafranca. mirror.theinfo.org/9810/zizek.html ("While Foucault and Derrida dissolve the human subject in a sea of discursive indeterminacy and historical contingency, Habermas's defense of reason ultimately rests on a vision of the individual as an ethical actor in a functional community").

To date, our incompletely theorized First Amendment has not been up to the task. Yet the constitutional dimension is present whenever design decisions are made about the cognitive infrastructure. Perhaps a shift of focus from speaker to speech as the object of constitutional protection would allow the Supreme Court to set a more consistent, comprehensive, and democratic course in future network decisions.

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